The American Bar Association Journal

PUBLISHED BY
THE AMERICAN BAR ASSOCIATION

VOLUME V

1919

THE LORD BALTIMORE PRESS
BALTIMORE

VOL. V. No. 1. JANUARY, 1919

The American Bar Association Journal

ISSUED QUARTERLY

BY THE AMERICAN BAR ASSOCIATION

CONTENTS

Subscription price to individuals, not members of the Association nor of its Bureau of Comparative Law, $3 a year. *To those who are members of the Association (and so of the Bureau), the price is $1.50, and is included in their annual dues.*

The Advertising Department is in charge of M. Curlander, Law Publisher, Baltimore, Md., to whom all communications as to advertising space and rates should be addressed.

OFFICE OF PUBLICATION

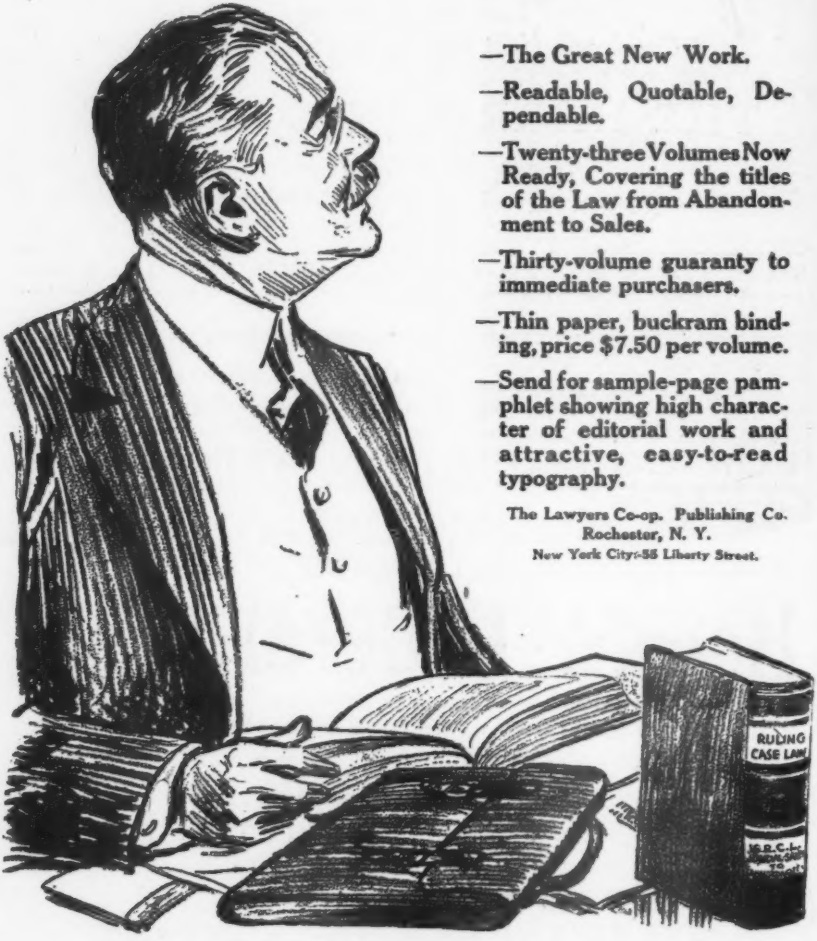
1416 Munsey Building, No. 7 North Calvert Street, Baltimore, Md.

THE LORD BALTIMORE PRESS: PRINTERS

Entered as second-class Matter March 17, 1915, at the Post Office at Baltimore, Maryland, under the Act of August 24, 1912.

The Annual Meeting of the Association will be held at New London, Connecticut, September 3, 4, 5, 1919.

Ruling Case Law



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The American Bar Association Journal

VOL. V JANUARY, 1919 No. 1

I.

ANNOUNCEMENTS.

ANNUAL MEETING.

The Forty-Second Annual Meeting of the Association will be held at New London, Connecticut, September 3, 4, 5, 1919. Dr. David Jayne Hill will deliver an address.

EXECUTIVE COMMITTEE.

The Executive Committee will meet at White Sulphur Springs, W. Va., April 24, 1919.

REFORM OF PROCEDURAL METHODS.

The following resolution was adopted by the American Bar Association at its annual meeting in Cleveland upon recommendation by the Conference of State and Local Bar Associations, viz.:

"*Resolved,* That bar associations, state and local, should systematically endeavor to secure the elimination from the law in their respective states of such anachronistic conditions as impede the proper administration of justice and thwart the effective securing of those rights which ought to be secured in accordance with the common habit of the people; and to this end we recommend that procedural methods be committed to those who are responsible for the administration of justice, the courts. We recommend the efficient organization of the judicial branch of government, and that substantial steps be taken by the respective associations for the systematic study of the actual administration of justice and the actual effect of anachronistic legal institutions, rules and documents."

HONORARY MEMBERS IN CANADA.

Hon. Sir Horace Archambeault, of Montreal, Chief Justice of the Province of Quebec, died in September, 1918.

John E. Martin, K. C., of Montreal, has been appointed a justice of the Court of King's Bench. Hon. Mr. Justice Martin was the bâtonnier of the local bar in 1913 when the Association held its annual meeting in Montreal.

GASTON DE LEVAL.

Maître Gaston de Leval, the Belgian barrister who addressed the Association in 1917 on the Cavell case, writes of his return to Brussels, saying: "In our beautiful courthouse, cleared of Boche contaminations, the Cour de Cassation (Supreme Court) has reconvened in a solemn session in which the King participated. On January 1 we shall all wear our official robes in court when we take up again the practice of our noble profession after the long interruption."

GENERAL GEORGE P. SCRIVEN, U. S. A.

King Victor Emmanuel has conferred upon Brigadier-General Scriven, who delivered an address at the last meeting of the Association, the distinction of Grand Officer of the Crown of Italy. General Scriven's address at Cleveland was entitled: "Italy, our Ally; Her Great Part in the War." It has been translated into Italian.

UNIFORM FLAG ACT.

Upon the report of the Committee on Uniform State Laws, the Association adopted, at the meeting in Cleveland, a resolution approving the **Uniform Flag Act** prepared by the National Conference of Commissioners on Uniform State Laws, and recommending it for adoption by the various states.

The Vice-President and Member of the General Council from each state will please note the above recommendation by the Association, and will endeavor, in accordance with By-Law XII of the Constitution, to procure the enactment by their legislature of the act approved by the Association. A copy of the act will be found in the July JOURNAL, page 539; additional copies may be had on application to the Secretary.

BINDING THE JOURNAL.

The Lord Baltimore Press is prepared to bind THE AMERICAN BAR ASSOCIATION JOURNAL in uniform binding at a cost of $1.50 per volume. In color and style the binding will be similar to that of the Annual Reports. Members desiring to have the four numbers of the 1918 JOURNAL bound in one volume, will please communicate directly with The Lord Baltimore, Press, Greenmount Avenue and Oliver Street, Baltimore, Md.

BOOKS RECEIVED.

Acknowledgment is made of the receipt by the Secretary of the following books:

Report of the Thirteenth Annual Meeting of the Mississippi State Bar Association.

New York County Lawyers' Association Year Book, 1918.

Report of the Alabama State Bar Association, Vol. XLI, 1918.

Proceedings of the Wyoming State Bar Association, 1918.

Proceedings of the Indiana State Bar Association, 1918.

Report of the Library of Congress, 1918.

MEETINGS OF STATE BAR ASSOCIATIONS IN 1919.

MISSISSIPPI STATE BAR ASSOCIATION, Clarksdale, April 30.

HAWAII BAR ASSOCIATION, Honolulu, May 29.

ILLINOIS BAR ASSOCIATION, Chicago, during June.

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III.

CONFERENCE OF BAR ASSOCIATION DELEGATES.

The Conference was called to order by Hon. Elihu Root, of New York, at 10 A. M., on Tuesday, August 27, 1918.

Chairman Root:

Since the inspiring and patriotic meeting which we held a year ago in Saratoga Springs much has happened to fill the soul of every true American with pride and joy. What we saw then with the vision that came from a lifetime devoted to the studies of the principles upon which the American system of justice rests, the whole world sees now, that the great conflict which is raging upon all continents, which is involving practically all the peoples of the earth, is a conflict not for territory, for boundaries, for aggrandizement, for wealth, for trade, for advancement of international political purposes, but is a conflict between two great underlying principles of civil government and civil and social organization. It is a conflict between the divine right of kings to govern and hold subject the great masses of mankind, and the inalienable right of the individual to life, liberty and the pursuit of happiness, to maintain and support which governments are created. It is a conflict between the ideal of a past which we had supposed to be vanishing, and the ideals of a future towards which we have looked forward with hope and confidence; between the pagan scheme of human life and the Christian hope of human destiny.

Since the last meeting of this Conference that conception of the real nature of this conflict which makes it America's conflict has spread throughout the great body of the American people, not without credit for the revelation of the truth by the men who gathered at Saratoga last year and left our meeting there with their hearts awakened to a new fervor of patriotism. We have had a new evidence of the work of American free men during the past few months. In 1864 Lincoln said, "It has long been a difficult question whether any government act too strong for the liberties of its people could be strong enough to maintain itself in great emergencies." That was answered by Lincoln in the election of

1864, and we have had another answer, from a broader field and under more terrible tests, for in response to the demands the people of the United States have risen to the duty of defending their liberties and the liberties of the world and are exhibiting now a degree of power and efficiency which cannot be surpassed, if it can be equalled, by men trained for generations in Germany under a monarchy. Those boys who went to their death on the Marne were doing more than they dreamed to keep back the Germans from their possession of the fair fields of France. They were demonstrating the capacity of a free democratic government to defend itself, to maintain itself, to exceed in power the discipline of a docile and servile people. General Mangin, addressing the corps of American soldiers who were under his command in the great advance between Soissons and Chateau Thierry said: "You went shoulder to shoulder, you have gone into the fight with the sons of France, you ran as one going to a feast."

Men undisciplined, uncoerced, each one himself a wellspring of enthusiasm and a power for the maintenance of the ideals for which he lived! Ran to it! Ran to the fight as one going to a feast! Go back for a moment to our own feelings two years ago when this country seemed to be sleeping, to be indifferent, to be content in luxury and ease and prosperity, when it seemed to be forgetting all the ideals of its noble past, when it seemed for the moment as if patriotism was dead. Think back to that day and then think of the situation today. Never since those days when upon a barren shore little bands of white men took up their warfare against a savage foe, have such portentious events happened for America as have occurred since we met only last year at Saratoga. And we have proved, we are proving today, that the idea of individual freedom, the habit of calling no man a superior, the sense, unconscious in men of equal sovereignty in man and woman and boy carries with it a development of power. I affirm, and I put in evidence the record in France during this past summer, that a German boy coming from the Rhine to America and living our free life here with that development of character that comes from freedom, that comes from equality with all mankind, that comes from a consciousness that there is no superiority, that such a boy going back is twice the man that the German boy is who has

remained servile and subject. Our power of liberty with its will to manhood we are proving and we are going to prove in this war.

Now all this is lawyer's business. All this is a matter which directly concerns and appeals to us, for it is the basis of the theory of government, the fundamental basis of the law that we are asserting which is working out the development of those theories of freedom. The fundamentality of freedom is illustrated by us every day in court. It is because for 300 years we in the courts of America have been asserting rights; not asking favors, but asserting *rights* in the name of the law which the judge upon the Bench must bow to equally with the Bar. It is because that conception of the relation of the individual to the law and the ministers of the law have permeated this entire people and developed with their growth, that America is competent to defend herself, undisciplined though she may be, unprepared though she may have been. And our daily occupation is the supreme exhibition in civil and ordinary life of that fundamental spirit of Americans, the assertion of rights against all power, in the name of a law prescribed by the sovereign power of the whole people for the protection and direction of each individual.

There is another side also which affects the American lawyer in this conflict. There is coming to be—aye! there is, a dual warfare going on. One, the armies in France and Flanders and Italy and Mesopotamia and the Balkans; the other the propaganda—the propaganda through the International Socialists; the Bolsheviki and their friends in France, in Italy, and in America—the I. W. W.'s. That is a warfare of propaganda appealing to the hope and to the prejudices of the discontented, and it was that—not the power of arms—that overcame Russia. It was that—not the power of arms—that drove back the Italians in the great Austrian drive last year. It is that which we have more to fear than the power of German arms. That is aimed directly at the very fundamental basis upon which all that we believe in rests. It is the theory of socialism as against property, the theory of internationalism against nationalism. And there is one view of internationalism which an American lawyer should not lose sight of, and that is this: That the international theory completely ignores the value and the right of local self-government in which inheres our liberty. The theory of the Bolsheviki was that Russia

was of no particular account. The government of Russia should be overturned. Yes. But also the governments of France, of England, of Italy, and of the United States, and Germany incidentally, and the whole world should be ruled by an organization of the brotherhood of the Proletariat. Where does the right of men to order their lives in their own communities in accordance with their views of what is right and just and desirable go under such a system as that! Fundamentally the conception of the nation rests upon the right of local self-government, and the theory of internationalism would destroy the semblance of the nation and reduce the whole world to one level of slavery governed by some far distant power. Upon that side as well as upon the side of arms the whole basis of American law and American justice is at stake here. And far more important than any case that we have to argue as to what the law is, or is not, as to what law should be, applied to facts of particular incidents, is the question whether there is to be any law; the question whether a jurisprudence on which the whole work of our lives has rested, and is to rest if it continues, shall be swept away and in its place shall be established a distant and intolerable tyranny in which the individual, the locality, the state, the nation all are subordinated and subjected to the power of international organization.

The Bar has answered to the demands which these amazing issues present. It was a fortunate circumstance that the President placed in the hands of the head of the law department of the army the application of the law for conscription and for the raising of the vast army already in France, and the still greater army which is about to follow; for, in the first place, the judge-advocate general, General Crowder, when he became provost-marshal general, applied the new law under the war power of the constitution to the people of the country with a just sense of their legal rights and the legal principles to which they were accustomed. I do not want to pass his name without expressing a sense of satisfaction and without doing honor to that admirable and able and effective officer, General Crowder. We have had much criticism; many things have necessarily gone wrong, many things have made us unhappy, but we could always turn to him and to his work as proof that virtue still remained in the American people. Whatever has gone wrong it has not gone wrong with him, and the result

of his work is a million and a half of American soldiers in France today and a million and more that are yet to go. General Crowder, as I say, applied the new law under war powers to the American people with a just sense of their legal rights. To accomplish that he called upon the Bar, and the Bar of America has responded most nobly by the thousands and tens of thousands and have given their services and their devotion to the work which underlies all American service in France. The law offices of the country have been emptied not merely of the noble and generous youths who have gone across the water, but of their elders who have laid aside lucrative business and have given their time and their strength, some of them to the extreme limit, to the application of this law of conscription to the American people. The result is that the draft has taken its place throughout America with the good will and the satisfaction and the undiminished patriotism and the enthusiasm of the entire people, and the boys who have been drafted and have gone into the national army are as full of patriotism as any man that ever marched in any army.

Assistant Secretary Kemp of the American Bar Association was made Assistant Secretary of the meeting.

Chairman Root:

I will ask Mr. Cohen to now present his report as the General Secretary of the Conference.

Julius Henry Cohen, of New York:

I have been able to bring up to date the records of officers of bar associations in many of the states; and replies to the invitation to attend this Conference have been received from 100 local and state associations, of which nearly 70 have appointed delegates.

W. H. H. Piatt, of Kansas City, Mo.:

I move that the Chair appoint a committee of three to report to the Conference at this evening's session nominations for officers for the ensuing year.

Adopted.

Chairman Root:

The Chair will appoint on that committee Mr. Piatt, Mr. Burr and Mr. Cherry.

The Chairman of the Special Committee appointed by the Executive Committee of the American Bar Association to take charge in Washington of the co-ordination and arrangement of the war work of the Bar, will now address the Conference.

John Lowell, of Massachusetts:

The seven months work of the Special Committee for War Service of the American Bar Association just finished proves what we all knew, that no men are more patriotic and public spirited than the lawyers. There existed, however, a wide-spread feeling throughout the community that lawyers always required compensation for their services—that they never did anything for nothing—and among the poor and uneducated in the large cities we were regarded as predatory in our nature. I confess that sometimes as I have seen the splendid service rendered gratuitously by doctors in hospitals I have wondered if lawyers would do as much. Upon the passage of the conscription law and selected service act came the chance for the lawyers to show what they would do.

With the assistance of our Secretary, the legal advisory boards of the country were organized by General Crowder, helped by the vice-presidents and general councils, the work of which has been referred to by General Crowder as 100 per cent efficient. The work of the lawyers of the Legal Advisory Board and tens of thousands of lawyers on the questionnaires did more to dispel the feeling that I have alluded to than anything that could possibly have been done. These boards exist in almost every county of the union engaged in assisting soldiers and sailors and their dependents. There are also in addition to the state bar associations, local bar associations, in all more than seven hundred in number. In many states and cities there are also war committees of the Bar Association. It behooves us to see to it that some plan of close co-operation between these association boards and committees be worked out.

The wise advice of our Chairman, Senator Root, in starting the work of committees, was of great assistance to me. He

impressed upon me the necessity of keeping separate the organization of the American Bar Association, and always to bear in mind that although the committee, at the request of President Wilson, was working in close co-operation with the Department of Labor, it was also working with all the other departments and bureaus of the government which were engaged in war work, and that to do our work effectively we must not be absorbed in or become a section of the Department of Labor. It has been my privilege, as Chairman of this Special Committee, with the able and loyal help of my Secretary, Lawrence G. Brooks, to prove to the country what the lawyers stand for and what they are willing to do for the public service. More than five thousand lawyers have offered their services, almost always at material sacrifice. More than seven hundred bar associations of the country have nobly responded to the calls made upon them, and the more than thirteen thousand lawyers of the Legal Advisory Board have continued their gratuitous services. In every state the lawyers have shown their willingness, and even eagerness, to help the government. In one county of California every lawyer tendered his services.

We have in our office, besides the lists of the legal advisory boards, and of the Presidents and Secretaries, and in most cases members, of the local bar associations, a list containing at least one lawyer in almost every county in the union, and our own personally selected lawyers in every state who have acted as our advisors in passing upon the qualifications of lawyers offering their services, and, when needed, of lawyers we have chosen for the departments to help the dependents of soldiers and sailors in cases of emergency.

President Wilson asked the committee to work in close co-operation with the Secretary of Labor because his department was placing men of all kinds in service, while part of our work was to place lawyers.

With the aid of the Secretary of the Treasury we prevented the machinations of unscrupulous lawyers' claim agents who attempted to exploit the war risk insurance by advertising that they would collect the claims of soldiers and sailors on a percentage basis. This service, except in cases of unusual difficulty, is being performed gratuitously by the lawyers of the country.

The work of the Special Committee for War Service was started in Washington in January, 1918, primarily to find out what government positions there were requiring lawyers and to furnish for these positions lawyers best qualified to fill them. Approving of this plan, President Wilson wrote that if the work was undertaken by a committee of the American Bar Association, it should be in consultation and close co-operation with the Secretary of Labor, who was doing the same work in a larger field. He was utilizing the man power of the nation by placing men in government service who were engaged in all lines of work. We were, therefore, by placing lawyers, doing part of the work of the Department of Labor.

As soon as we were established, we published a statement of our work in the principal law journals throughout the country, calling attention to the fact that there was a War Committee of the American Bar Association, consisting of Elihu Root, William Howard Taft, Jacob M. Dickinson, Frederick W. Lehmann and George Sutherland, and that we were appointed as a subcommittee or special committee for war service. These statements were copied with certain variations quite generally by the press throughout the country, and, as a consequence thereof, offers of service kept coming in from lawyers, until with the names we have received from the judge-advocate general's office and elsewhere, we have now enrolled on our lists more than 4000 lawyers willing and anxious to assist the government.

Through the Presidents and Secretaries of the bar associations and the members of more than 600 of these associations; with the aid of members of the American Bar Association and our own personal acquaintances, we selected lawyers in all the states who acted as our advisors, and also selected lawyers from any city or town where their services were needed. Besides the lawyers, bar associations, our own advisers and the legal advisory boards, the members of which are over 13,000, we have selected lawyers in all of the 3000 counties and more of the country.

We have continually borne in mind that the American Bar Association must maintain its separate organization, and that although we have our offices with the employment service of the Department of Labor, we are working with all the government departments and bureaus which are engaged in war work.

To simplify the work of finding what positions there are in Washington requiring the services of lawyers we are working with the War Service Exchange to bring about if possible a personnel section of the War Department to which section all of its branches will send full information as to their needs.

We have done work for all the cabinet officers but two; namely, the Department of Commerce and the Department of the Interior, the latter of which has now about 900 lawyers in its service, and the former refers all matters relating to law or lawyers to the Department of Justice.

To the State Department we furnished the names of several lawyers for international law work. We also supplied lawyers to that department qualified for work in the consular service.

We have discussed with the State Department and international lawyers the question of co-ordination of the work of the various law departments so as to minimize the chance of conflict of discussion on questions of international law, and also have assisted the Department of Justice in the attempted co-ordination of all the law departments.

With the aid of Secretary McAdoo and the Bureau of War Risk Insurance, through the legal advisory boards of the country, we put a stop to the activities of certain claim agents and attorneys in Washington and elsewhere who were sending out circulars and in other ways advertising that they would collect the claims of soldiers and sailors on a percentage basis. The lawyers of the country have volunteered to collect these claims without charge except in cases of unusual difficulty, thereby giving to the soldier and sailor the full amount of his claim without deduction of at least 10 per cent for its collection. This we accomplished by an amendment to the existing law which we helped Congressman Treadway, of Massachusetts, to draft, and the passage of which he afterwards secured, by the terms of which the Treasury Department is given full control of the payment of these claims.

We also supplied the internal revenue branch of the Treasury Department with lawyers for income tax and other work.

With General Crowder, the Council of National Defense and the American Red Cross, we worked out a system of local boards by which free legal advice and assistance is given to men of the armed service and their dependents.

To the judge-advocate general, the adjutant-general and other departments, we are furnishing almost daily reliable lawyers in various cities and towns to assist soldiers and sailors and their dependents in cases of emergency.

For the Department of Justice we have selected prominent lawyers throughout the country to aid the district attorneys when such aid is needed. We supplied this department with a lawyer whose principal duty is to find out the status of the interned alien enemies, so as to utilize as far as possible their services for farm and other labor; and with this department and the Department of Labor, we worked out a plan by which friendly enemy aliens are allowed to pass through the barred zones for work on the farms.

For the Housing Corporation of the Department of Labor we have selected and are still selecting prominent lawyers, especially qualified to serve that corporation in the places where its projects are to be carried out. We have also supplied lawyers to certain branches of this department in Washington; have helped it with suggestions and advice on other placement work and have co-operated with its representatives and the representatives of the Commissioners on Uniform Laws and the War Industries Board in drafting adequate anti-loafing laws, and have chosen lawyers to aid in perfecting the field organization of the United States Employment Office.

With the Secretary of the Navy we called the attention of the legal advisory boards to the Soldiers and Sailors Civil Relief Act, and through their aid received the cordial assistance of lawyers in carrying out its provisions.

To the Department of Agriculture we have supplied several lawyers.

To the War Trade Board we have supplied many lawyers; to the Food Administration, lawyers for their various activities; we have supplied lawyers to the Fuel Administration; to the Quartermaster's Department; to the United States Shipping Board; Emergency Fleet Corporation; Council of National Defence; Commission on Training Camp Activities; Chamber of Commerce of the United States; and to the Y. M. C. A. and the American Red Cross for overseas work.

We have furnished lawyers qualified to work on insurance in its different branches; on contracts; on corporation law; on inter-

national law; on accounts; on statistics; to work on office management; on personnel management; on law enforcement; as prosecutors; on administrative management; as executives; as field secretaries; as trust lawyers; and as trust investigators in various departments of the service.

To the War Industries Board we have furnished the names of lawyers of prominence for special service.

To the Military Intelligent Branch of the War Department we supplied more than 500 lawyers for its work throughout the country.

The Alien Property Custodian, after having sent out circulars to all the lawyers in the country, approximately 150,000 in number, asking them to furnish him information as to alien enemy property in their localities, and having received replies from 30,000 of these lawyers, called us into consultation as to how to enlist effectively the services of the remaining 120,000 lawyers. We worked out a plan by which the Alien Property Custodian wrote me a letter urging us to assist him and I sent a copy of this letter with the circular of information from Mr. Palmer, and a personal letter signed by me, to each of the Presidents of the local bar associations, more than 700 in all, telling them that I had promised the Alien Property Custodian that the lawyers of the country would help, and asking each President to get the members of his association to send such information as they could get of enemy alien property to the Alien Property Custodian in Washington.

The Alien Property Custodian has also asked us to furnish him with the names of lawyers in many of the counties of the United States to represent him in court when necessary.

To this department we have also supplied several lawyers for work in Washington.

To the Bureau of War Risk Insurance we are furnishing one or more accredited lawyers for voluntary work in every county of the union, and in many of the large cities as many as 10 to 15 in each city. To the Claims Department of that bureau we have furnished many lawyers experienced in that line of work. We have also had conferences with the counsel and director of the bureau.

On several occasions we have found that work was being done in one department in ignorance of the fact that the same or very

similar work was being done in another department at the same time. By getting together the men who were engaged in this work we have prevented duplication of effort.

Since the telephone and telegraph have been taken over by the government, we have been in consultation with the Postmaster General's Department on the question of lawyers for its services.

One of the most important tasks we have to perform is to persuade patriotic lawyers whose time is much taken up with war work at home, that they can do more valuable work for the government there than at Washington even though their work may seem to them to be remote from the front line of battle.

In these and other ways we have utilized the services of a large proportion of the lawyers of the country who have responded most patriotically to the calls made upon them.

Many other opportunities for the services of lawyers are continually arising and the outlook is that even after the war is over and in the readjustment period that will follow, the services of patriotic lawyers will be of equal value to the country.

In these and other ways we have utilized the services of the lawyers of the country. We have borne in mind that the three essential requisites are *loyalty*, competency and the spirit of sacrifice, that makes a man choose to do what he can do best, despite the superior attractions of other work.

Through our constant visits to various departments we have been able to prevent duplication of effort by getting together men who are unconsciously working on similar work at the same time.

In short, we have tried to see that the right lawyer was put in the right place, and that those already in the right places were kept there, thereby forming one link in the chain of efficiency (not as the Germans understand it) but efficiency born of the spirit of sacrifice nurtured in our land of freedom, which developed individual initiative and resourcefulness; that efficiency, that power that accomplishes a desired or designed work that with the help of God will win this war.

Let us all so work that when the soldier and sailor boys come home victorious we may greet them with a happy consciousness that we have done our part in sustaining them in their splendid and successful fight for liberty.

Charles A. Boston, of New York:

I am a poor substitute for Mr. Henry W. Taft, but he is the chairman of so many committees in New York at this time that he could not forsake his duties to come here. I have happened to have had an inside view of most of the things that are being done, and I will attempt to sketch the method in which the Bar in the City of New York is organized to help along our war work. You will bear in mind that the population of the City of New York is the largest of any single community in this country; that the Bar of the city is the largest of any city in this country; that the City of New York is divided into five boroughs, and that almost a distinct Bar exists in each borough; that the population is polyglot, that it is in no sense homogeneous, and similarly the Bar is not homogeneous and consequently it is more difficult to organize than is the Bar of any other community in the land. There are, it is said, in the borough of Manhattan and the borough of the Bronx between 12,000 and 15,000 practicing lawyers; in the borough of Brooklyn about 5000, and in the two other boroughs, Richmond and Queens, 700 or 800 each.

In each of the boroughs, committees for war work which had been formed were soon consolidated into a Joint War Committee of the City of New York. This committee established headquarters under Executive Secretary Montfort Mills and provided for the securing of every sort of legal assistance to men in United States forces, and much other legal work in aid of the war. As you know, experience under the first draft soon demonstrated that systematic aid of a professional character was essential, and the regulations provided for legal advisory boards to take these matters in charge.

In this official work the committee was constituted by selecting as its Chairman, Mr. Henry W. Taft; as its Treasurer, Mr. John M. Bowers, recently deceased, a partner of Ambassador Gerard; the present speaker, as the "Third Permanent Member," so styled in the Selective Service Regulations, of the Legal Advisory Board for the City of New York. Ex-Justice Charles E. Hughes was already rendering magnificent service as the Chairman of the District Board under the Selective Service Law for New York City; and Mr. James Byrne, now the legal advisor of the American Red Cross in Italy, was also a member of the District Board

and thus unavailable for the Legal Advisory Committee. But both were consulted by the government in its formation, with the result above indicated.

The board thus formed had but two weeks for organization, and the problem was to secure quarters, workers, equipment, etc. We were substantially aided by our Executive Secretary, who had rendered great and valuable service and experience during the first draft. We were also aided by the five auxiliary borough boards, of three members each, which undertook the work of organization, headquarters, and equipment, in each of the boroughs. We promptly secured about 3300 lawyer assistants, 500 clerical assistants from the girl students of Hunter College, the crown of the public school system for girls in New York City, and also during the Christmas holidays volunteers from all of the school teachers in the city. The greatest problem we had to contend with was the lack of heat, for the bulk of the work was done during the height of the coal famine. Some of our employees succumbed to pneumonia brought on by the excessive cold weather. It was at this time that Mr. Bowers died, presumably largely as a result of his industrious labors. Mr. Delafield was promoted to his place. Mr. Young, one of our Queens Auxiliary Board, was killed in a motor accident. We had some fifty people at our central headquarters, including a complete stenographic force, telephone operators, etc., and a corps of volunteers constantly on call from 9 A. M. to 10 P. M. to interpret the law and the regulations for inquirers. The perplexing questions, especially of alienage and citizenship, were many. The Mayor's Committee on National Defence was an ever-present aid in many particulars, especially in securing interpreters, of which we had a large volunteer force. When we were confronted with rulings by a local exemption board of a densely populated district of foreigners confined on appeal by the District Board that a man of draft age who had been in this country 10 years—subsequently reduced to seven—was conclusively presumed to be a citizen of the United States, the central law boards were of no substantial service; but where national legal principles prevailed, their aid was of incalculable advantage to the individual advisors.

These methods of immediate organization made it possible for our members to advise over 250,000 registrants in the early stages

of the classification, but when the work became so heavy that, so far as I am advised, our carefully devised system for the report and preservation of statistics went to the wind through sheer inability of individual members and their aids to take the time to record their work, we held frequent evening meetings with the Auxiliary Borough Boards to advise methods of efficiency dictated by experience. Of these we kept careful minutes, in which the historian of the draft law will doubtless find valuable information of facts. Mr. Taft has made an official report to the New York State Bar Association on the Bar in the War, and Mr. Mills has written me of the specific work of the Joint War Committee of the Bar which supplements the work of the Official Legal Advisory Board. Together these two bodies have substantially covered the whole field of organized volunteer work at home. I wish I were in a position to mention the volunteer legal work that has been done by Mr. James Byrne, who is now in Italy, but I am not sufficiently advised.

The question of charging for services to registrants is one with which we are now confronted. We have discouraged such charges by members of the board, even outside of the scope of one's duty, as tending to bring the administration of the law and its regulation into disrepute. Large warning placards have been put up, in many languages, in all headquarters, to the effect that there is no necessity to pay any fees to lawyers. From time to time we have had complaints of charges by local war boards. In every one of these instances the offending lawyer has pleaded ignorance of any impropriety. In one case only, after prolonged investigation, we refused to recognize as a proper defence, the fee.

We are now preparing to revise carefully the activities of our board for the new registration, under the extended ages.

I wish that I had time to read Mr. Taft's report, and Mr. Mills' letter, in order to elucidate to the Conference what complete organization of the Bar in this work means.

Julius Henry Cohen, of New York:

The following resolution has been prepared by the committee in charge of the Conference, and I move its adoption:

"*Resolved,* That the delegates from state and local bar associations assembled in conference today do solemnly pledge themselves to renewed service to the nation in all the fields of war

activity where the knowledge and experience of the lawyer especially qualify him; that we particularly pledge ourselves to the President, the Secretary of War and the Provost-Marshal General to man local exemption and district boards for the important and additional labors they are about to be called upon to perform in securing the additional military forces necessary to win the war; and, finally, we call upon all lawyers throughout the country not already engaged in war activity to put themselves into immediate communication either with the Committee on War Service of the American Bar Association or with their respective local organizations of the Bar or the legal advisory boards of their district under the Selective Service Law and Regulations, to the end that every lawyer in the country shall be selected for service at home or abroad in the position or work for which he is fitted."

Adopted.

Chairman Root:

The reports made by Mr. Lowell and by Mr. Boston are before the Conference for discussion.

James H. Harkless, of Missouri:

I would like to inquire of Mr. Lowell if there had been no money provided for carrying on of the work of his committee.

John Lowell:

The expenses of the Special Committee up to date have been paid by the American Bar Association under a resolution adopted by its Executive Committee, but what will happen hereafter remains for the future to say. That does not continue beyond this meeting.

Moorfield Storey, of Massachusetts:

Is this a Special Committee of the American Bar Association?

Chairman Root:

The committee of which Mr. Lowell is Chairman is a Special Committee of the American Bar Association. The committee of which Mr. Boston is a member is a committee of the New York State Bar Association.

Charles A. Boston, of New York:

Pardon me, Mr. Chairman, the committee of which I am a member is officially instituted under the Selective Service Law

and is a part of the administration of that law under the United States Government, but I am here as spokesman for Mr. Taft, who is a member of the committee of the New York State Bar Association which you refer to.

Edward Q. Keasbey, of New Jersey:

I should like to inquire of Mr. Boston whether there are similar organizations in each of the other sections of New York; whether the local bar associations are organized, or whether it is all done under the Selective Draft Organizations in the various counties.

Charles A. Boston:

I do not think there is any well-recognized uniform scheme about it. Each local bar association has, I believe, done what has seemed to it proper. There is such a committee of the New York State Bar Association. I am not advised, however, whether there is such an all-embracing committee of any local association outside of the city.

William A. Ketcham, of Indiana:

At the request of Mr. Fraser, the President of the Indiana State Bar Association, I move that it is the sense of this Conference that lawyers should not be permitted to charge fees for services rendered to registrants and their dependents in connection with the selective draft.

Charles A. Boston:

I should like to speak upon that resolution, because I have seen this matter I think in its every aspect. I am thoroughly in sympathy with the principle of the resolution and I am not prepared to oppose it. I have seen, however, how such a resolution might work out to defeat the purpose for which it is designed. I first encountered it as a member of the Committee on Professional Ethics of the New York County Lawyers' Association, where it had the fullest discussion. We discovered in practical operation that if lawyers were prohibited from taking fees for work of any nature from registrants that there were a large number of lawyers who would be so busily engaged otherwise that they would not come to the aid of registrants. In the City of New York we have volunteer workers, 3300 in number, who have

taken the official oath, and a large number of others who have volunteered through the Joint Committee of the Bar and who have pledged themselves not to charge for their services where the situation is such that a charge would not be justified. The Joint War Committee soon reached the conclusion that there were cases brought to it where it would be an imposition on the lawyer to require him without charging to do the service necessary for the protection of a client and where the client was amply able to pay.

[Mr. Boston described a case of registrant having very large bank obligations, soon maturing, who needed the best legal advice. He consulted the Chairman of the Legal Advisory Board, who, after doing a tremendous amount of work, arranged the business in relief of the registrant who was willing and anxious to pay for the services. But two of the three members of the board were of the opinion that a charge would be unwise if not unlawful.]

Our board has had placards scattered broadcast, and published in the newspapers, saying: "Pay no fees to lawyers, notaries or others in connection with the administration of this law. Members of the Local Advisory Board will render the service gratuitously."

If you pass a resolution which is couched in the broad terms in which this is, I think you will be doing as much harm as good. We have fought it out before the Board of Directors of the New York County Lawyers' Association, and we have corresponded with many representative bodies throughout the country on the subject, and there is a report on the subject which will appear in the forthcoming annual of the New York County Lawyers' Association. Now, I have this to suggest to General Ketcham, if he will accept it as a substitute for the resolution that he has proposed—that we adopt something like this: That it is the sense of this Conference that whether a lawyer be a member of a Local Advisory Board or not, and whether he has taken an official oath or not, that when he undertakes to perform legal services for or in behalf of registrants and their dependents, under the Selective Service Law and Regulations, that it is not proper for him to charge for his services.

Thomas J. O'Donnell, of Colorado:

Would that include the case you mentioned in the illustration that you gave, Mr. Boston?

Charles A. Boston:

I do not think so.

Thomas J. O'Donnell:

I move, as a substitute, that the matter presented in the resolution offered by General Ketcham and in the suggested amendment made by Mr. Boston be referred to a special committee for consideration and report, which special committee shall consist of the Chairman of this Conference, General Ketcham and Mr. Boston.

Chairman Root:

The question is on the substitute. Are there any remarks?

Julius Henry Cohen, of New York, said that he agreed as to the difficulty of the question: that the subject had formerly been referred to the Committee on Professional Ethics of the New York County Lawyers' Association, whose report in answer to question 149 appears in the Report of the Committee on Professional Ethics of the American Bar Association, which left the decision to the lawyer in each particular case.

Mr. Cohen (after reading the answer) said that he was of opinion that if we lay down a general rule that even where a registrant is perfectly able to pay his counsel shall not accept a fee, there is danger of making it possible for notaries and others to practice law unlawfully.

The motion to refer to a Special Committee was adopted.

Adjourned to 2 o'clock P. M.

SECOND SESSION, 2 P. M.

Chairman Root:

The first subject before the Conference this afternoon is the interesting one of eradication of unnecessary technicality, in the prevention of unnecessary litigation. The discussion will be opened by Thomas W. Shelton, of Virginia.

Thomas W. Shelton, of Virginia:

I rather expected that Mr. Root would say a word in reference to the absolute necessity for doing away with the technicalities that we are now going to consider, but I assume that he has paid

a compliment to your intelligence and is mindful of the fact that the American Bar Association and the several state associations have been giving this matter attention during the past eight or nine years. He understands that you are thoroughly in sympathy with the subject.

Now before endeavoring to point out to you a concrete scheme I want to mention an incident that occurred eight years ago, and at the same time, draw your attention to the historical debate held in the Federal Constitutional Convention by our forefathers in order that the lawyers of this day may be awakened to the precise duty that they have to perform if this government is to stand, and certainly if this government is to obtain the best results—the results expected by our forefathers, for that means an inherited responsibility. About eight years ago it was my honor and great fortune to be in the company of a very celebrated Chinese diplomat and scholar. I venture to say that he was as familiar with the theory of our government as any man alive, although he was not a lawyer. He pointed out to us the great benefits that were being derived and that should be derived from our form of government and its division into the three departments—executive, legislative and judicial. Turning to the small group of lawyers about him, one of whom was a distinguished official at Washington, he said that he did not believe there was another nation of people on earth that would continue to submit to the delays, the expense, and the uncertainty of its judicial department as represented by its courts, as the people of the United States. To his mind that was the greatest evidence of a deep-seated love of country inherited from a people who had come to this land and who, together with the rest of us, strove to perfect its government and continue it. He referred to a letter from Thomas Jefferson, and to a speech made in the Constitutional Convention wherein he objected to certain things being written into the constitution because, he said, there were certain things that should be left to those who were to come after them, and who would be better prepared than they were to perfect those things in the detail manner of their operation. And he then said, pointing with an accusing finger to the lawyers present, "Whose business is it to protect and look out for the judicial department of the government? Whose business it is, under the theory and science of your government, to protect and look out

for the judicial department?" Instantly, with a feeling of shame at the question, the thought came to me, why should the judicial department of the government need protection and need looking out for. That thought carried me back home to my library where a study of the Madison's Papers, to my astonishment, proved that it was the unanimous opinion of the framers of the Constitution of the United States that under the plan that they created there was no protection for the judicial department; that it stood the risk which every other judicial department has stood throughout history, of being destroyed by the legislative department. Thoroughly alarmed, Mr. Wilson of Pennsylvania, proposed that there should be a coalition between the judicial and the executive departments in order that they might protect each other. Mr. Madison endorsed the proposition. In two discussions, one of which occurred perhaps six weeks after the first, it was the opinion of the members that it would not do to enter into such details. They proposed to keep the three departments absolutely separate, but they would depend upon the patriotism, the learning, the understanding and the spirit of their children and their grandchildren to understand as they understood and to carry the spirit of that Constitutional Convention into the year 1918, and on throughout time.

Gentlemen, I ask you today if that has been done? Isn't it a fact, that I have the right to stand here and say to you that the day has come when the prediction made by those far-seeing men in the Constitutional Convention has come true; that the time has come when the legislative department of this country not only tells the courts what they shall do, which is proper and quite right, but it has gone a step further and has told the courts how they shall do it? Why, in the great State of New York they have a code going into the minutest details as to exactly how the courts are to administer justice. I need not say to you that the power to direct the manner of doing a thing is the power to direct the result. We are today facing the exact critical condition that was predicted by the makers of the Constitution, and I ask you to reflect about it. Think of it as that Chinese diplomat caused me to think of it, and ask yourselves if we are living up to the heritage that was bequeathed to us by our forefathers. Are we taking such steps and are we standing up for fundamental principles?

I need not repeat that there is nobody except the lawyers and the judges that are prepared, under the circumstances, to protect the judicial department of our government. Indeed, I did not have to answer that learned Chinaman that it was the lawyers who should do this. He had in mind that if this government were ever to fall it would be because of the trespass of the legislative department upon the judicial department, and that it would be accomplished in such a slow and insidious way that but few men would observe its retrogression.

I am not a pessimist. I believe in this government, and that is why I am standing up here this afternoon to make an appeal to you in reference to some practical way in which we shall go about our task. Under the inspiration of Mr. Taft there was introduced in the American Bar Association a resolution under which there was created a Committee on Uniform Judicial Procedure. That committee conceived the idea of organizing the lawyers of this country, and it did the unexpected thing of attacking the result first. In other words, it adopted the program of inducing Congress to enact a law giving to the Supreme Court the same power over the law side of the courts that it has always had over the chancery side. The time was not then believed to be ripe to accentuate that matter. Those of you who heard or have read the words of Mr. Taft at the Washington meeting of this Association need no assistance in picturing the perfected procedural reform. It will be found in time that America will have a better system than has England. This committee sought to pass that statute and they set to work, men like Mr. Taft, Senator Root and Judge Parker to accomplish it. I remember listening to Mr. Root explain why it was constitutional for the Supreme Court of the United States to have the power it was proposed to vest in it. It involved one of the organic principles of our government.

Now, I want to say a word in reference to the work that committee has been doing. It is endeavoring to organize the Bar in every state in the union. For that purpose the members of the committee have gone all over the country addressing bar associations, chambers of commerce, credit men's associations and civic bodies. We have organized the lawyers in a great many states. There are still some states that haven't an organization of the kind that will do the greatest good. In Pennsylvania, when it was suggested its Bar Association pass a resolution creating a

state committee, with a member from each congressional district, with a central chairman, it was unanimously adopted. The Chairman of our committee can now communicate with the Chairman of that state committee and, through him, reach the member from each congressional district, who in turn not only reaches his member of Congress and the Senators, but the business people of the Congressional District. If we set to work in earnest in this thing we can get the people behind us. This plan has been endorsed by 45 states of the Union. I think it would be a good idea if it was suggested to the American Bar Association that it create in each state a subcommittee of the Committee on Uniform Judicial Procedure, whose business it would be to aid our committee in order that the object in view may be carried on. This plan our committee has been trying for nearly six years and it has given assurance of absolute success. Our real object is to divorce the legislative department from the judicial department. It does look strange that it should be necessary to go to all this trouble and expense in order to carry that plan through Congress. Yet there are members of Congress, able men, some of the learned men in that body, actually standing in the way without offering anything better. They have a feeling somehow of unwillingness to respect the views of others. John Stuart Mill said, There is hardly any kind of intellectual work which so much needs to be done as the business of making laws. Organized society has no more dangerous enemy than the legislative incapacity to distinguish between personal pride of opinion and the general welfare, and it is in the power of a few such men to prevent all advancement. No man is so merciless as he who, under a strong self-delusion, confounds his antipathies with his duties.

In leaving this matter with you let me say that if the lawyers of America mean to maintain the preeminence which is absolutely essential to their welfare and as we have seen to the continued existence of this government, they must see to it that there shall be created that, and that only, which is superior, in connection with their profession and its instrumentalities.

Daniel S. Remsen, of New York:

In line with the speaker's plan that he has outlined, I desire to offer the following recommendation:

"*It is recommended,* by the Conference of State Bar Association Delegates, that the American Bar Association shall adopt the following resolution:

"*Resolved,* (1) That there shall be created a Subcommittee on Uniform Judicial Procedure for each state and territory, which said committee shall consist respectively of a member from each congressional district of such state or territory, to be named by the President of the Bar Association, one of such members to be designated as Chairman.

"(2) It shall be the duty of such subcommittee to assist and advise in the nation-wide campaign being conducted by the Committee on Uniform Procedure."

W. A. Ketcham, of Indiana, said that so large a committee would be unwieldly, and he thought it would be better to have a committee of one from each state.

Henry Upson Sims, of Alabama, referred to the body of English law as having become very complete in 1873 when the new practice was introduced; but that, in this country, we have no body of law in any state which can be called as complete as the law of England. He thought that the substantive law should be referred to the Commissioners on Uniform State Laws, though he doubted if there would soon be a uniform body of laws in all the states. He thought that there should be a uniform system of law before we attempt to adopt a uniform form of procedure. He was opposed to the resolution.

Moorfield Storey:

It seems to me that this resolution, in proposing a committee almost as large as the membership of the House of Representatives, ought to be defeated. In the House of Representatives the members are paid a salary, and they are paid mileage for attending its sessions. Yet that great committee assembled under the dome of the capitol has never undertaken, as a whole, to frame any law; they appoint committees, consisting of a small number, to do that work. What chance is there with a committee of the size here proposed, with its members receiving no salary and no mileage, of accomplishing anything?

If we are to have a committee of this sort it must be a small committee. I do not quite agree with the last speaker that because the laws of the various states are different that their methods of procedure cannot be unified. Whatever the law may

be, there should be a civil process, a settled process, for bringing before a legal tribunal a question of law. The fact that we disagree shows how controversial the question is likely to become. I submit that it is the purest waste of time for us to constitute a committee as large as this in the hope of its ever accomplishing anything. Today there is a committee of the American Bar Association engaged in dealing with this subject. It is a small committee, and it probably will accomplish something. When its results have been reached and are submitted to the Association it would seem to me possible to appoint committees in each state to undertake the work of persuading the Bar of that state that the system ought to be adopted.

A. H. Robbins, of Missouri:

It seems to me that the gentlemen who have spoken on this subject have failed to take into account what the American Bar Association has already done. That is sometimes due to the fact that many men attend the meeting of the Association one year and do not come back the next year. Now, one thing that has been settled in this Association for six years is that it is one of the ideals of the American Bar Association that there shall be uniformity as far as possible in procedure.

Mr. Shelton is responsible for much of the success that has already been attained in this work, and it would be ridiculous for us to go back upon what he has done. We can always have an ideal, whether we shall always realize it or not. The general ideal is that so far as may be practicable to make it possible for a lawyer in any state of the union to practice in any other state. The idea which we have adopted in this Association over and over again is that the Supreme Court of the United States can frame a code of procedure applicable to the practice in the United States courts. Mr. Shelton has nothing else in view than to divorce the subject of procedure from the legislative department and confide it to the courts. Then the Supreme Court of the United States, acting first and setting the example, the courts of the several states can do likewise. We had difficulty in Missouri in getting that idea passed by our bar association, but after a number of debates the lawyers gradually came to the conclusion that it was workable, and we hope to have it adopted at the next meeting of

our state bar association. I hope this resolution will prevail if for nothing else than that it will show our confidence in the committee which has worked so hard and well upon the subject.

On a division the resolution was adopted by a vote of 50 to 12.

Chairman Root:

The Chair will ask Mr. Daniel S. Remsen, Chairman of the Committee on Prevention of Unnecessary Litigation of the New York State Bar Association, to address the Conference.

Daniel S. Remsen, of New York:

The question presented for our consideration is: How can the Bar best be organized for the prevention of unnecessary litigation and thus increase popular respect for law and public confidence in the legal profession?

In answer to this question I have been asked to tell about the work, the purposes and the progress of our Committee of the New York State Bar Association on the Prevention of Unnecessary Litigation.

Our committee was appointed at our annual meeting in January, 1914. After careful consideration, a circular letter asking for suggestions was sent to all members of the Association and to many other lawyers, judges and laymen throughout the United States and Canada. This resulted in many valuable suggestions from all classes of persons.

With these suggestions before us and after full consideration, our committee reported in substance as follows:

1st. That the point at which unnecessary litigation could be the most easily prevented was at the source; that is, before the facts, upon which a dispute can be based, have become fixed.

2d. That the remedy was largely to be found in greater confidence and co-operation between the laity and the legal profession.

3d. That the bar association could properly emphasize the importance of clients consulting counsel freely before the facts, upon which a dispute can arise, become fixed.

4th. That the bar association could properly encourage the education of the public to appreciate the importance of and to demand the preparation of more carefully prepared wills, contracts and other writings.

5th. That the bar association could properly encourage lawyers and laymen to co-operate in the preparation of the best possible legal instruments.

This report was agreed to and the committee authorized to continue its work.

During the following year the committee was not obliged to continue its work alone. The attention of laymen and commercial bodies was attracted to our efforts for the prevention of unnecessary litigation and they wished to lend a hand. Our report, after having been printed, was circulated by many exchanges and commercial organizations, chief among which was the New York Chamber of Commerce. This organization referred our report to its Committee on Arbitration and, on receiving its report, sanctioned the fullest co-operation with the New York State Bar Association in its efforts to prevent unnecessary litigation. Since that time it has not failed to embrace every opportunity to support our efforts.

The immediate result was a formal communication from the committee of the New York Chamber of Commerce to our committee commending our work as "worthy of the honorable traditions of the profession" and stating that in their opinion a great opportunity was "at hand for co-operative usefulness between commercial organizations and the legal profession." That committee then suggested that our respective committees agree upon a few simple rules for the guidance of laymen in the prevention of unnecessary litigation, to be reported to our respective organizations for approval and when approved by both, to be jointly promulgated.

This suggestion was approved by the New York Chamber of Commerce and the New York State Bar Association and their committees instructed to act accordingly.

Then came the most serious work of our committee.

After much consultation and discussion between representatives of the two committees, it was agreed that our first duty was to locate, as far as possible, the subjects and causes of unnecessary strife as revealed in the courts.

At this point, we were confronted by the fact that no classified record is kept in the courts of the subjects or causes of dispute and litigation. We, therefore, turned to the 23 volumes of

Abbott's New York Digest of reported cases as the only available index, imperfect as it might be. Here we found court decisions classified according to subject matter and each subject analyzed with reference to the questions litigated. We thereupon printed, for the purpose of distribution, the analysis at the head of each of the 25 major subjects of litigation as measured by space occupied. In this analysis, we gave the number of pages of the digest devoted to the whole subject and also to each subdivision thereof.

The members of both organizations, judges, other lawyers and laymen were invited to participate. They were furnished with analyses of the subjects in which they were interested and requested to make suggestions. Several hundred such suggestions came from judges, lawyers and laymen throughout the United States and Canada. With these before the joint committee it prepared a set of rules for the prevention of unnecessary litigation. These rules were subsequently approved by both organizations and jointly promulgated.

An examination of these rules will show that they are intended to be simply common-sense rules of business for the guidance of laymen. They do not attempt to make every man his own lawyer, but rather to promote confidence and co-operation between the laity and the legal profession. They have received the hearty commendation of many lawyers, judges and business men and have proved helpful to the lawyers that use them and to their clients.

Under the head of prevention of litigation at the source, rules are given relating to the making of contracts, wills and other instruments and, generally, as to seeking advice of counsel.

Under the second head of prevention of litigation, after the facts become fixed and before suit, various methods of settling differences, including arbitration, are commended.

Under the third head of prevention of unnecessary litigation after suit, parties and counsel are urged to narrow the issues by agreements and stipulations concerning facts wherever possible and to maintain an open door for amicable settlements.

The greater number of rules are directed to the prevention of litigation at the source. This was found to be necessary after analyzing the 25 major subjects of litigation just mentioned.

To my amazement and the amazement of many others, the volume of litigation concerning wills seemed to exceed by far that on any other subject. Corporations came second; executors and administrators, third; municipal corporations, fourth; master and servant, fifth; and contracts, sixth. This classification is no doubt very crude, largely because of the method of making up a digest. Nevertheless, with all its imperfections, it is some index as to the quantity of litigation on each subject.

When the digest of each subject, however, is examined for the purpose of locating unnecessary strife within that subject, the principal value of the analysis becomes apparent, even if only approximately accurate. Thus it appears that of the great volume of litigation concerning wills 82 per cent is of a preventable nature, while 73 per cent concerns the meaning and legal effect of the instrument and less than 8 per cent concerns mental capacity, fraud and undue influence.

These figures would certainly be significant in connection with any subject of litigation. They are doubly so in connection with an instrument which, next to the contract, according to Sir Henry Maine, "has exercised the greatest influence in transforming human society."

Master and servant showed 80 per cent of the litigation concerning injuries to servants. This condition has now been met by the passage of the Workmen's Compensation Act.

Under contracts, the volume of litigation was more evenly distributed among the various questions litigated. Twenty-eight per cent related to the meaning and legal effect, 25 per cent to performance, 20 per cent to validity, 20 per cent to remedies for breach and 7 per cent to contracting parties.

The discovery of the germ center of unnecessary strife in the principal subjects of litigation put the committee on inquiry as to ways and means of prevention with the results as stated in the rules.

I will now say a word as to our progress.

As the work of the New York State Bar Association for the prevention of unnecessary litigation is largely educational, it is difficult to measure its progress.

We know that the public has become interested in the rules we have prepared. We know that many lawyers and laymen

have commended them. We know that many trade organizations have approved them and distributed them to their members. We know that through the efforts of the New York Chamber of Commerce many boards of trade and chambers of commerce in other cities have distributed these rules to their members and in some instances they have asked their local bar associations to co-operate in the prevention of unnecessary litigation. We know that the Trust Company Section of the American Bankers' Association has taken up the subject, so far as it relates to the preparation of better wills, and is preparing a nation-wide campaign of education through trust companies in co-operation with the legal profession and on the basis of those rules.

The medical profession was formerly known for its remedial measures. Its signal honors, however, have come from its new work in the prevention of disease. So, the legal profession has won its high position largely through its remedial work. Its signal honors, however, await the development of its power for the prevention of disputes and unnecessary litigation. In my opinion, the educational work along the lines of prevention, already begun among lawyers and laymen, is worthy of encouragement.

"A great opportunity is at hand for co-operative usefulness between commercial organizations and the legal profession." It now remains for the American Bar Association and for the state and local bar associations to take such action as shall seem to them best.

In order to set the matter before you in suitable form for discussion I will suggest the following resolution:

"*Resolved*, That the Conference of Delegates of the American Bar Association and of state and local bar associations hereby recommends that the various state and local bar associations of the United States co-operate with individuals, state and local chambers of commerce and other organizations in the prevention of unnecessary litigation along the following lines:

"1. By issuing suitable literature and providing suitable speakers to address business organizations.

"2. By emphasizing the importance of clients consulting counsel freely before the facts upon which a dispute can arise have become fixed.

"3. By encouraging lawyers and laymen to co-operate in the preparation of the best possible legal instruments.

"4. By encouraging, and by making known the fact that they are encouraging, the settlement of disputes out of court as far as practical.

"5. By urging the Bar and business men generally to pull together in each locality for the prevention of unnecessary litigation.

"And in so doing it is further recommended that the work of the various state and local bar associations be, so far as practical, co-ordinated and standardized, and that a special committee of five be appointed for that purpose."

The adoption of such a resolution will stimulate action. Then, whenever a commercial organization and the Bar of any community shall agree to co-operate for the prevention of unnecessary litigation, you have then and there begun to increase the popular respect for law and the public confidence in the legal profession.

Chairman Root:

The Chair will now ask Mr. Charles L. Bernheimer, Chairman of the Committee on Arbitration of the New York Chamber of Commerce, to address us.

Charles L. Bernheimer, of New York:

Some eight years ago, when we put into execution our present system of commercial arbitration, certain newspaper headline writers predicted the abandonment of all litigation, but, notwithstanding these predictions, the lawyers seem to flourish in undiminished ranks and to be actively plying their ancient mental métier at their old stand. We at the New York Chamber have never believed that the establishment of easy methods for the disposition of controversy would either antagonize or oust the lawyer. We regard the lawyer as our friend, as our faithful co-worker, co-builder and advisor in trade and industry. When, therefore, the opportunity came, we were only too happy to co-operate promptly and enthusiastically with the New York State Bar Association. We welcomed this comradeship not only for its value to these two organizations *per se*, but also in the broader sense, because of the promise in store for Bar and business at large in the bringing together of two such strong organizations of professional and business men for worthy purposes and for greater general usefulness.

I shall describe as briefly as possible our system of commercial arbitration as it exists under the auspices of the New York Chamber of Commerce.

Our present system of commercial arbitration as instituted by the New York Chamber of Commerce has a three-fold object: First, the prevention of unnecessary litigation. Second, the saving of time, trouble and money to the merchant, the lawyer and the state. Third, the maintenance of commercial honor. The New York Chamber of Commerce has experimented with a number of forms of arbitration with varying degrees of success since its organization in 1768. In 1911 our present system, built upon and profiting by the experiences of the past, was inaugurated.

The chamber furnishes free of charge the services of its staff and an adequate place for the hearings by the arbitrators. You will be interested to know, also, that the decorum at these hearings is no less dignified than in court, that the well-known tension of the court room is lacking as is also that interchange of poignant repartee between advocates and that a waste of time is avoided by quickly getting to the nub of the controversy. The arbitrators rise to the importance of the occasion and I am glad to say they avoid compromise and splitting of differences. They seek to ascertain the points in the case and determine it upon its merits.

So far as the general theory and practice are concerned (a theory and practice which can easily be adapted and adopted by any organization, professional or commercial), let me say that the functions of our Committee on Arbitration are, in the main, administrative and mediatory, although it sits in specially important arbitration cases. Its advice as *amicus curiæ* is given in *formal* arbitration when both parties unite in asking for it, but it always functions as guardian and interpreter of the rules under which we operate. The Arbitration Committee acts in an advisory and adjusting capacity in such cases as can be handled by means of *informal* arbitration or of mediation or conciliation. The majority of the cases that come before us fall into this class, since it is the aim of the committee to prevent *formal* arbitration quite as much as to prevent litigation. In all its endeavors, it strives to establish commercial equity, a high regard for

commercial honor and ethics, and to prevent the disruption of business friendships. I am happy to say that we have never experienced difficulty with the parties to a dispute over the formal award made by our arbitrators, and we have yet to hear of an instance when in the case of mediation and conciliation, our advice has not commanded confidence and respect.

In the main the success of our work is due to the reputation and character of the chamber and the kind of men available for arbitrators. Work such as we are doing is dependable and likely to succeed when operated under the auspices and rules of an organization of good standing. It is surrounded by pitfalls when managed by detached individuals. In your case, the local and state bar associations provide such auspices, and in our case, it is the New York Chamber of Commerce, with its wonderful history and reputation. We of the New York Chamber realize how fortunate we are in having as sponsor such a respected and confidence-inspiring body. It is the oldest trade organization in this country. Its charter dates back to 1768. Its arbitration committee was the only civil court authority in the City of New York during that distressing period of the Revolutionary days when the city was occupied by British military forces. The reputation of the chamber is world-wide not only among merchants, but among all classes of people, and its certification of values to foreign governments established by means of price arbitration sittings is sought frequently, especially in recent months.

Let me say a word regarding the character of the arbitrators. The chamber furnishes for this work an official list of some 300 arbitrators, men of the highest commercial standing and experience in the community, experts in their own lines, who have agreed in advance to serve and to accept the responsibilities of their office. The Committee on Arbitration, which is composed of seven and elected by the chamber, can therefore draw on this list for an authority in the special field of business under consideration. The arbitrators are paid ten dollars a day when serving, and are therefore like the "dollar-a-year" man in that his time is worth many times more.

Let me make it very clear that our arbitration system rests upon the existing statutory law of the state, under which parties

may agree to submit an existing controversy to arbitration and upon the basis of the award may secure the judgment of a court of record. While accepting the advantages the law offers, we also shoulder the burdens it imposes; namely, the revocability of arbitration agreements. Let me explain the latter:

Our chamber has received within the last month from the London Court of Arbitration the following arbitration clause, recommended for insertion in all contracts:

"All disputes which may arise under, out of, or in connection with, or in relation to this contract, shall be submitted to the arbitration of the London Court of Arbitration, under its rules for the time being."

The standard arbitration clause prepared by counsel, which our committee has recommended, is as follows:

"All disputed questions of fact that may arise and occasion controversy relating to this contract shall be submitted to arbitration, under the rules for the time being of the Committee on Arbitration of the Chamber of Commerce of the State of New York. In the event of the failure of the parties to agree upon arbitrators, the Committee or Arbitration of the Chamber of Commerce is hereby authorized to select three impartial persons from the 'official list' of arbitrators, with the same force and effect as if their names were herein inserted. No litigation of any kind or character shall be instituted until such arbitration shall have taken place and the arbitrators made their award thereon."

The present condition of American law upon this subject, however, is most unfortunate for the movement in the direction of the prevention of unnecessary litigation as well as in relation to this country's rapidly expanding foreign trade. The London Chamber of Commerce clause as well as ours which I have quoted are *valid* clauses in England as well as in every other civilized country. But in the United States the London clause is *not* valid and our own is of doubtful legal value. Why is this?

Our committee has given very careful study to this subject for years, as it presents a pivotal point for the prevention of unnecessary litigation in all ordinary commercial relations, both domestic and foreign. A gentleman who is a member of your Association was some time ago requested by us to make a lawyer-like study of this subject. The result of his research (which was most minute), is about to be published in book form by

D. Appleton & Co. under the title, "Commercial Arbitration and the Law." I think you will find that the author has proved that the doctrine of the revocability of arbitration agreements is not only obsolete, but is bad law. I should not be so bold as to enter the field of legal controversy; but if the material gathered in this book shall ultimately convince the courts of our country that contracts of this sort are binding, I can say to you as one familiar with international commercial public opinion upon this subject, that we shall be more respected in other countries where business men now fail to understand why our laws enable a business man in the United States to escape the consequences of his part of the bargain. I, myself, have been unable to understand why, if I make a trade with a London merchant fixing a price based upon the assumption that any controversy that might arise would be disposed of amicably without litigation, the contract should be binding and enforcible in England, but not in this country.

At all events the effort to prevent unnecessary litigation, the effort to save time, trouble and money; the effort to reduce the law's delays, and the effort for the maintenance of commercial honor, has resulted in the re-examination of this entire subject and I trust that if you agree with the conclusion, you will take steps for the correction of this error in the law without going to the legislature for relief.

Mr. Remsen has given you a statistical classification of causes that produce litigation which, with my foregoing remarks, clearly evidence the fact that such a system of arbitration as we operate at the chamber is necessarily confined to a very limited filed of litigious matter, in fact, is confined in the main, to "contracts," the sixth in importance on Mr. Remsen's list. In other words, such a system must be limited, with but few exceptions, to the disposition of questions of fact. You will see therefore that there are eliminated at once such subjects as wills, corporations, executors and administrators, municipal corporations, master and servant. It is true that many pure questions of fact are involved in disputes in which the government, municipal, state and national, is concerned; but for reasons which undoubtedly you know better than the layman, such matters are very rarely disposed of by commercial arbitration. I wish the

field could be extended, and the example of the United States Shipping Board and the Public Service Commission of New York followed. I have upon other occasions pointed out how the government could save considerable sums by encouraging the bidding on government orders on the theory that the more bidders the better the terms to the government. This increased bidding follows naturally when the business man learns that any dispute which may arise can be disposed of amicably by means more effective and far less costly than litigation; namely, by arbitration.

I should like to emphasize as much as lies within my power that from our point of view arbitration and the practice of the law are variants, that is, different phases of the same endeavor. I should like very much to dissipate any impression that may linger in the minds of lawyers that there is any hostility between business men and lawyers in this matter of arbitrating commercial disputes. I should like no less to dissipate any feeling that may exist in the mind of the layman that the lawyer encourages litigation. As a matter of fact, I can testify that the lawyers have been most ready to avail themselves of the facilities of arbitration which our chamber has afforded—have been most ready to co-operate with us in the prevention of unnecessary litigation. Indeed this movement for the prevention of unnecessary litigation in the form it has now taken and originated as it was by the Bar, might very properly be regarded as something in the nature of an antidote to the feeling that lawyers wish to maintain the *law court* as the sole agency for disposing of differences. The public generally, we are bound to say, is not fairly disposed toward the profession. It is apt to look upon the lawyer's occupation as a "non-essential industry," sometimes even as a "parasitical industry." This viewpoint needs correction through the best educational process devisible. Is it not worth while to teach the public to think of the lawyer as the phagocyte of commerce, paralleling in society the functions in the human body of those white corpuscles of the blood which dispose of disease germs?

The expression "prevention of unnecessary litigation" is something definite and concrete to put before business men. It is a *solvent* that brings together as in a melting pot both business

man and lawyer, forming a "combination"—using a chemical term—which can only result in increased popular respect for the law and larger public confidence in the legal profession. You will be glad to know and I delight in testifying that this exact process is now in operation, for our system at the chamber is often employed by attorneys who desire to save their clients the expense and annoyance of litigation—indeed most of our formal cases find their inception in law offices.

It was, therefore, but a natural step in evolution, when the New York State Bar Association invited the New York Chamber of Commerce to co-operate in the establishment of an arbitration system which should provide lawyer arbitrators to dispose of questions of law as well as questions of fact, and in the joint preparation and promulgation of the "Rules for the Prevention of Unnecessary Litigation."

It would seem advantageous to all concerned that the existence of this co-operative movement between business and Bar for the prevention of unnecessary litigation should be known far and wide, but to make it clear to the business man, we would do well to adopt his own methods and make the proposition a "selling proposition." We should create a demand for it as we create a demand for a new brand of merchandise, observing always, of course, the ethics of your profession and using such tact as the situation requires. Now, in any scheme of marketing we have two very essential elements: First, the standing and reputation of the concern offering the product; second, the product itself. To continue with this figure of speech, the standing and reputation of the chamber of commerce or trade body or bar association which acts as sponsor for a system to prevent unnecessary litigation provides the first, and for the second, we have the rules carefully prepared and issued jointly by the New York State Bar Association and the New York Chamber of Commerce and the arbitration systems already instituted by these and other organizations. To make them generally known and to achieve their acceptance, I would suggest that lawyers embrace every opportunity to appear before local chambers of commerce, boards of trade or business men's associations and discuss this very interesting subject, that they make propaganda for the movement, that they encourage the forma-

tion of arbitration committees under the auspices of local bar associations, and that, so far as they can, they apply these rules in their dealings professionally with business men, and urge them to do likewise. We at the New York Chamber will continue energetically to support the movement. We shall not be slackers. For, in the broadest sense, Bar and business are joint participants in a common venture—the better carrying on of human intercourse.

Frank W. Grinnell, of Massachusetts:

I wish to offer an amendment to the resolution offered by Mr. Remsen. My amendment is that a copy of the pamphlet which is entitled "Rules for the Prevention of Unnecessary Litigation," referred to by Mr. Remsen, and a copy of his address, and that of Mr. Bernheimer also, be sent by this Conference or by the American Bar Association's Committee, to all bar associations in the United States, and to all chambers of commerce, boards of trade, and similar bodies, in order that these suggestions may be brought to their attention.

Daniel S. Remsen, of New York:

I will accept the amendment made by the gentleman from Massachusetts.

Julius Henry Cohen, of New York:

As neither Mr. Remsen nor Mr. Bernheimer are members of the Conference, in order to conform strictly to proper procedure, I suggest that the motion before us should be made by some member of the Conference.

Chairman Root:

By general consent, the question before us may be considered as made by a member of the Conference.

The resolution suggested by Mr. Remsen, as amended by Mr. Grinnell, was adopted.

Daniel S. Remsen, of New York:

I was amazed at the subject of wills being referred to, and I was curious to know to what extent it was so in other states. I found that taking some six subjects, while they do not come

exactly in the same order, Wills has 2588 pages devoted to it in the Century Digest and in the First Decennial Digest. That brings it down to 1907. Those subjects are subdivided. Upon the nature and extent of testamentary power there are 34 pages. Upon testamentary capacity there are 107 pages. Upon the requisites and validity there are 294 pages. Upon probate establishing and annulment there are 341 pages. Upon construction there are 1118 pages. Upon the rights and liabilities of devisees and legatees there are 597 pages. The last two could really and properly, for our purpose, be classed as of a preventable nature. So that I think that the New York figures are not very different from what they would be if we examined the whole country over. In other words I find that on that basis the percentage of litigation concerning the meaning of the instrument, throughout the whole of the United States down to 1907, is in the neighborhood of between two-thirds and three-fourths of all litigation concerning wills.

Moorfield Storey, of Massachusetts:

How many cases are disposed of by the chamber of commerce by arbitration?

Charles L. Bernheimer, of New York:

We divide our work into two classes, which we call mediation and conciliation classes. Now, during the last 12 months we had before us approximately 150 cases of one class, and of the other class only 10 cases. We strive to prevent formal arbitrations as much as we try to prevent litigation in the courts. We endeavor to have mediation or conciliation, some action of that kind, taken in order to bring about the settlement of any dispute.

Chairman Root:

Gentlemen, as neither Mr. Remsen nor Mr. Bernheimer is a member of this Conference, and they have kindly come here to enlighten us upon this most interesting and practical work for our benefit and for the benefit of the community generally, and as Mr. Bernheimer occupies the distinguished position of being the first and only layman who has been adventurous enough to enter this company, I suggest that a vote of thanks to these gentlemen would be most gracious.

Loran L. Lewis, Jr., of New York:

I take great pleasure in moving that the thanks of this Conference be extended to both of these gentlemen for their interesting and instructive addresses.

Con P. Cronin, of Arizona:

I take great pleasure, sir, in seconding that motion.

Chairman Root:

All in favor of the motion will signify it by saying aye; it is unnecessary to put the negative. Mr. Remsen and Mr. Bernheimer, the thanks of the Conference are unanimously extended to you for your courtesy in appearing before us and delivering these most instructive addresses.

The reports and this whole subject are now before the Conference for comment.

Henry T. Lummus, of Massachusetts:

I understand that the principal work of the Arbitration Committee of the New York Chamber of Commerce is in the line of mediation, which is a form that may impose upon the parties all legal consequences except as they choose to abide by the decision of the mediators. But laying that aside for the moment and taking up the subject of the more formal arbitration, I would like to inquire of Mr. Bernheimer whether he sees any advantage to be gained by a formal arbitration that is not secured through the court by the selection of masters or auditors in ordinary legal proceedings?

Charles L. Bernheimer, of New York:

Being a layman I am not competent to answer a question involving procedure in the courts. I am proud to say that I am a layman who knows nothing about law. Indeed. our whole arbitration work is based upon that. I cannot answer the question; I am not competent to make the comparison that the gentleman asks for.

Henry T. Lummus, of Massachusetts:

My inquiry was directed to ascertaining whether the formal arbitration has any advantages over the system that prevails through courts of law in securing the appointment of arbitrators in any dispute.

Charles L. Bernheimer, of New York:

That I could not answer, because it involves a comparison that I cannot properly make.

I do not know what the formalities are that are attached to the legal end. But I do know that even the small formality attached to a formal arbitration before our committee is irksome to the merchant. One of the reasons why it is so very easy for us to persuade a man from a formal arbitration and have a mediation or conciliation adjustment is because he dislikes to sign a formal submission to have his difference with his fellow merchant submitted to arbitration and be obliged to appear and be examined under oath; he does not want that—it is too formal. Frequently differences and disputes involving large amounts are settled by us very easily. Only on Saturday last there was received at my office a letter from a merchant stating that the mere fact that the Chamber of Commerce in response to his telephone call had replied that it was willing to take up a case for formal arbitration had been sufficient to induce the party to adjust his difference with him.

Charles A. Boston, of New York:

This procedure, I may say, when formally adopted, leads up to the right to a record judgment, under our New York code of civil procedure, and it secures a quicker result, with less expense, and free from technicalities. That is what recommends it to merchants generally.

Julius Henry Cohen, of New York:

I would add to that statement that it becomes really a judicial proceeding when it is a formal arbitration; it is a formal submission of the parties, and it becomes a judicial proceeding under our code of civil procedure. The only difference is that instead of each of the parties appointing an arbitrator and those two selecting a third arbitrator, under the form of submission to arbitration by the Chamber of Commerce Committee, the chamber furnishes a list of arbitrators from which a selection may be made, and those arbitrators serve for purely nominal compensation. And the chamber furnishes also the background of commercial honor and a place where these differences may be

settled in a commercial atmosphere. In other words, instead of submitting a case to a judge and jury, who may not be equipped to pass upon a technical or trade dispute, the best men, experts upon those subjects, are available to the parties.

James H. Harkless, of Missouri, stated that every state has a statute of arbitration, with submission to the court for confirmation, but the people seem to prefer the courts.

William A. Ketcham, of Indiana:

Hasn't it been your experience that excepting in purely commercial communities and in purely commercial matters an attempt to proceed under arbitration is really an inducement to the beginning of litigation?

James H. Harkless, of Missouri:

Yes; I think it makes for law suits instead of preventing them. Understand me, gentlemen, I am not saying that chambers of commerce and boards of trade arbitrations in respect of things that require technical knowledge are not proper and are not to be commended, but I am not convinced that this Association should recommend arbitration to everybody in this country.

H. A. Davis, of Pennsylvania:

I would inquire whether in an arbitration matter before the New York Chamber of Commerce the respective parties are represented by attorneys?

Charles L. Bernheimer, of New York:

Not usually, but we do not discourage the representation of the parties by attorneys, neither do we encourage it. We find as a matter of experience, however, that the cases that are handled without the assistance of attorneys are disposed of more quickly and in the long run more satisfactorily.

H. A. Davis, of Pennsylvania:

I am wondering where we are drifting to. This is a conference of lawyers. Now, I belong to a chamber of commerce and I am proud of my membership in it, but I am here representing the Blair County Bar Association, of Pennsylvania, and I do not think that our people are ready to turn over their matters for

settlement to the chamber of commerce. Like my brother from Kansas City I still cling to the idea that matters of law are best entrusted to lawyers. I do not think it behooves this Conference of lawyers to pass any resolution that looks toward the deliverance of this sort of thing to any chamber of commerce.

Moorfield Storey:

Ordinarily under the state forms of arbitration the procedure breaks down for the reason that the parties fail to agree upon arbitrators. Each man selects his own friend to act as an arbitrator, and, of course, they are to select a third man, and it usually happens that the arbitrator who is the stronger compels the selection of the third arbitrator. Now, this report does not force anybody to abandon the law procedure or to arbitrate any matter, but it does say that if you choose to have the matter settled by men who are competent to deal with it, you may take advantage of such arbitration as the chamber of commerce offers, and there you have the best experts in their special lines who sit for ten dollars a day.

James H. Harkless, of Missouri:

Isn't it true that every state in the union has a provision whereby parties may arbitrate matters in dispute between them?

Moorfield Storey:

Certainly. But that means that they have got to agree upon arbitrators. The rule in Massachusetts for many years was that parties might agree to waive a jury in the trial of a case. When one party said they would try the case without a jury the other side would immediately say, "If you don't want a jury I do." Finally the law was changed so that if a man wants a jury he has got to claim it. Now, it is just so in respect of arbitration. You suggest an arbitration, and the other side says, "Well, that depends upon whether I can prevail on my friend so and so to act as an arbitrator." So our system of having arbitrators has been the most ineffectual method of disposing of the case. I think that answers the question of Mr. Lummus as to whether on the whole the system of having arbitrators or masters doesn't fill the bill. It does not, and the reason is because it is nobody's business to press the case. You may have a most important case

pending before a master and he doesn't proceed with it, and if the court makes an order requiring him to proceed from day to day the result perhaps is that an interminable litigation ensues which lasts until one man or the other says, "Let's settle it any way." Now, this system is a cheap system, and it is a quick system. I venture to say that no matter that has ever been presented to the Chamber of Commerce of New York took anything like six years to decide.

Now, gentlemen, you might just as well admit it, the mere business of paying a stenographer for transcribing long wrangles between counsel as to when adjournment shall take place, breaks down the system. Litigation is made expensive, and it is too tedious. If a system like this can be adopted, I think it is very much better for our profession and for the community at large. And when you are afraid that perhaps some of you gentlemen may lose business, bear in mind that out of all the great mass of litigation in the City of New York only 10 cases were disposed of by this committee of the New York Chamber of Commerce.

Thomas W. Blackburn, of Nebraska:

I would like to ask the Secretary whether the chamber of commerce has power to settle commercial questions.

Julius Henry Cohen, of New York:

Mr. Bernheimer calls attention to the fact that of the various cases that Mr. Remsen lists the work of the chamber of commerce is confined to that field of litigated matters which comes under the head of "contracts." They do not undertake to take in all sorts of matter; and I think, as Mr. Bernheimer points out, that a very large number of the matters disposed of have been brought before the chamber of commerce at the suggestion of lawyers for the parties.

Thomas W. Blackburn, of Nebraska:

Then I would also like to ask, Does the committee of the Chamber of Commerce mediate for persons other than members of the Chamber of Commerce?

Julius Henry Cohen, of New York:

Yes; they arbitrate between business men generally if they are requested to do so. I think Mr. Bernheimer could give you a

very interesting list of merchants who have availed themselves of the services of this Committee of Arbitration of the New York Chamber of Commerce, men who have no connection with the chamber of commerce at all.

You will find in the pamphlet relating to the prevention of unnecessary litigation a recommendation that questions of fact that can be disposed of by and through the friendly intervention of arbitrators, in the interest of preserving good feeling, should be so disposed of. That is one branch of the prevention of unnecessary litigation. Now, Mr. Remsen's suggestion is that since chambers of commerce and boards of trade exist for the disposition of such questions they can handle them and thus co-operate in the interest of unnecessary litigation. It is not suggested by anybody that arbitration is a substitute or a panacea for all litigation.

Nelson C. Hubbard, of West Virginia:

It occurs to me that there is one branch of the subject which Mr. Remsen's discussion and his resolution do not cover as fully as they should. There is a large field for development under Part III of these printed rules which can be taken up. The case after it gets within the control of the trial court; the recommendation made with reference to stipulations as to the facts and as to the shortening of the case is directed to counsel, and I think it should also be directed to the trial judge. It is one of my favorite beliefs that much of the delay that occurs in our trial courts is fairly to be laid at the door of the trial judges. They are the men who can appropriately and successfully bring about a system by which frequently there will be filed a statement of facts which will cut out two-thirds of the time that is spent in the introduction of testimony. So it seems to me that this matter should not be considered as confined only to the efforts to keep litigation out of court.

Thomas J. O'Donnell, of Colorado:

I have long had in contemplation the drafting of a bill to effect this very thing. It seems to me that instead of having A go to a lawyer and make a complaint against B, and A's lawyer, having only before him the statement of his client, brings a suit against B, and B hires a lawyer, immediately bad feeling begins;

it seems to me that if the state should establish a tribunal, appoint a lawyer, a judge, if you please, call him what you will, and provide that if A felt he had been wronged by B he could go to this "judge," and lay his complaint before him; the "judge" would thereupon write a letter to B saying A has been here and says with respect to a particular transaction that he does not think you have treated him fairly, and please come in and see me and give me your side of the case—that would be undertaken under the sanction and authority of the state, with the purpose and end in view of arriving at justice without delay, without bad feeling. If such a plan as that could be instituted I think it would be a great advance over the present system. I do not believe that our civilization has arrived at a stage as that we are yet prepared to make the decisions of these arbitration tribunals compulsory. In other words, so far as I have thought out this matter, I would not have the decision of this officer final; I would have him persuasive, and if the parties insisted upon going to war then let them go to war and suffer the results. If this profession to which we belong has any place in the present civilization, a thing which sometimes I much doubt, it should be able in itself and of itself to resolve and decide upon a plan by which the disputes that rend families and separate friends and cost money can be settled. We are an intellectual body, or supposed to be. We study and fit ourselves theoretically for these things. With all due respect to the mercantile classes, they are too much engaged in prices; they figure too much in quantities, in dollars, in cents. I am not in favor of the amalgamation of the American Bar Association and the American chambers of commerce—not just yet.

Edward Q. Keasbey, of New Jersey:

Under the Workingmen's Compensation Act of New Jersey there has been adopted a plan whereby the court appoints a lawyer, a young lawyer, or some one of not large practice, as a sort of assessor before whom all cases must be considered before they are brought in court. Now, that works very well. The parties appears before him and talk the matter over, and very many times it is settled without being brought into court at all.

I think most lawyers are themselves resorting to conciliation

in matters where it can be done. Most cases that are taken before lawyers are talked over by them with counsel on the other side. Indeed, lawyers understand that conciliation is a part of their business.

Chairman Root:

There is no motion before the Conference. We have been indulging simply in a general discussion.

The Chair will now declare an adjournment until this evening at 8 o'clock.

Adjourned to 8 P. M.

EVENING SESSION, 8 P. M.

The meeting was called to order by the Chairman.

Chairman Root:

The special subject of the Conference is under two heads: "Elimination of the Evils of Contingent Fees" and "An Authoritative Application of the Principles of Legal Ethics." Upon the first I will ask Mr. Stiles W. Burr, of Minnesota, to address the meeting.

Thomas J. O'Donnell:

May I ask the indulgence of the Conference to offer a resolution which grows out of the discussion in which the Conference was engaged just before adjournment? The resolution is as follows:

"*Resolved,* That the Conference recommend to the American Bar Association that it instruct the Committee on Jurisprudence and Law Reform to inquire into the feasibility and utility of the general system of a tribunal of conciliation and to report at the next annual meeting of the Association such recommendations if any as the result of the inquiry may warrant."

The resolution was adopted.

Chairman Root:

Mr. Burr, we will be very glad to hear you.

Stiles W. Burr:

It seems to me that the contingent fee is a necessary evil. That it is an evil I think is beyond debate. The relation in

which an attorney is put when he accepts a retainer on contract for compensation that represents a percentage of the recovery, and that is about what we understand to mean by contingent fee, and that is the sense in which I deal with it, the relation in which he is put is a false one. He ceases to be an attorney, a disinterested advisor and representative of his client and he becomes a partner in the game and it does not take much imagination to see the complications and the conflicts of interests that that involves and to see that it gives him the wrong sort of a position before the court. Now all that is true. In the books you may read that a contingent fee retainer is all bad, but it is, I think, necessary under our system in many cases, and at least it is not avoidable. There are situations where in no other way can a poor client obtain good legal talent except under a contract for compensation that is contingent upon success and I do not believe it would do, if we could, to prohibit; but I do believe that it ought to be regulated as it is not now regulated in any jurisdiction with whose practice I am familiar.

I said I did not know anything about it. I have a little hearsay testimony to go on. So far as I have that hearsay information I think the contingent fee is chiefly an evil, or leads to evils and abuse, perhaps, in damage cases, and in cases involving estates and trusts. Unregulated as it is now it is subject to great abuse and is the source of much evil. The answer generally made is that the laborer is worthy of his hire and that a contract for compensation made between an attorney and client in advance of the litigation has all the sanctity of a contract and must not be interfered with and cannot be inquired into, but it seems to me that the law is bad in that respect. If an attorney and client bargaining in advance over a contingent fee were on an equality the contract might have sanctity, but I do not think there is any equality when the sort of client who most often commits himself to a contingent fee and an experienced lawyer sits down to make the bargain. If my hearsay information is good, bargains of that sort are often made on conscious or unconscious misrepresentation as to the risks of the litigation and the amount of labor that will be involved. A contract for 30 or 40 or 50 per cent of the recovery might be reasonable pay for the work done by a lawyer who successfully carries the trial courts

and the courts of last resort a bitterly contested damage claim. It may be mere robbery if the matter is settled easily on a claim where liability is not denied, as in the case of a personal injury claim against a solvent railroad or industrial, and so I think that if it is made the law that all contracts for compensation of an attorney contingent upon the result, and especially where the compensation is to be a fixed percentage of the recovery, were subject to review by the court, and mind you, I don't mean by a jury in an action for recovery, but were subject to review by the court, that we would have a better scheme of things and less wrong done, and perhaps we would remove a good many of the evils and abuses that center around the tort damage business as most of us know it to be conducted. I do not know whether those views are popular, but if they are not they will help all the better to provoke discussion, and I understand that the purpose of these remarks is to start the discussion.

Charles A. Boston:

I feel as though I were encroaching on the time and attention of this Conference unduly, but your Secretary has thrust upon me the duty at this time of speaking of the work which has been done on this line by the Committee of the New York County Lawyers' Association, of which both he and I are members, which has considered the subject very seriously, with the result that it has pronounced an opinion and has expressed a view which lies at the foundation of this discussion tonight, and it seems entirely proper that the results of that consideration by that particular association in answer to a specific question submitted to it should be before you when you undertake to discuss this question at large.

I had the opportunity two or three years ago to address the State Bar Association of Minnesota just on the eve of Mr. Burr's presidency of that association, and I recall that at that time that association had under most serious consideration a report of a Committee on Professional Ethics which was made to it and which called attention to the development of this idea of the contingent fee in the State of Minnesota in a way which would make the man who prosecutes the business of contingent fee compensation anywhere in the United States envious at the

development which it had reached, and I recall what I say is hearsay, too, that it was reported in connection with that report that the contingent fee business had been so well developed in the State of Minnesota that there was one well-known firm that had at least 42 officers in other states for the solicitation of business to be brought to Minnesota in order that they might prosecute it there, and the arguments which they used were to the effect that an action for negligence for personal injury due to negligence was ambulatory in its character and that you could recover anywhere that you could find a defendant, and as most of the trunk line railroads in the United States ran somewhere through Minnesota, or had an office there, that under the law as interpreted in Minnesota you could make that railroad a defendant there at the instance of a plaintiff resident anywhere, for an action which occurred anywhere outside of the State of Minnesota, and that there was a very determined opposition among the ordinary rank and file of people in Minnesota to the corporations, and especially to railroad corporations, so that was a second point in favor of the plaintiff, and the third point in favor of the plaintiff was that you could recover damages if you got a majority verdict, and that with these arguments another firm had not only established business offices for the solicitation of business outside of the state, but that they had also established a hospital in which they maintained their clients if they needed attention, paying all the expenses of their keep, with the expectation that they would be reimbursed ultimately out of the verdict and judgment which they obtained against the unfortunate defendant, and that this inducement had acted so upon the stupidity or the sense of injury, perhaps, of those who were thus wronged by these heartless corporations that business was coming to Minnesota in such inordinate quantities that the taxpayers were beginning to groan under the burden which was improperly imposed upon them by this method of soliciting business and that the taxpayers were actually complaining that the courts, particularly of the counties in which St. Paul and Minneapolis are located, were engaged to a very large extent in the entertaining of business which was thus imported and that there was no imposition of a duty upon such importation, and

that the courts did not seem to regard the attorneys as under any especial duty to refrain from this method of soliciting business.

That was the situation about which Mr. Burr has been silent in his talk to you. Perhaps he only knew about it by hearsay and hesitated to testify. Those were conditions that were there seriously complained of, and it was said that that condition had been encouraged by the decision of the Supreme Court of Minnesota which, in a suit for the enforcement of the attorneys' lien after a settlement with the plaintiff, had determined that there was nothing against public policy of the State of Minnesota in the solicitation of business in that general way by an attorney—not in that particular case, but those specific circumstances—a defendant having in a particular case settled behind the attorney's back and the attorney having sought to foreclose his lien under the statute; in that foreclosure proceeding the defendant pleaded about the worst charges that it could think of against the attorney in respect to the method by which he had procured the business and they undertook to make that a defence, and without a hearing on the merits respecting the facts, but in the nature of a demurrer, the question was raised before the court whether when an attorney had obtained his business in that way he could enforce the lien so obtained, the idea urged by the defendant being that when a lien originated in a transaction of that sort it was void *abinitio* and that it could not be enforced against anybody. The Supreme Court of Minnesota took the opposite view and said that as far as Minnesota was concerned that defence would not prevail in such a proceeding, and if my memory serves me right, said in a broad way that it was not against the public policy of Minnesota.

Just about the same time in Tennessee a similar question arose and was decided in the opposite way, so that what is good morals in Minnesota is not considered good morals in Tennessee.

I have had some opportunity and occasion to consider this policy and I beg to assure you without going into details that the law of Rome, for one instance, the law of France, the law of England, discouraged any such idea, and one of the most ancient principles which was continually agitated in the law of Rome, and characterized as the "Cincian law" was directed against

the acquisition or enforcement of liens of this kind or an attempt to collect a contingent fee.

It is one of the main ancient principles in our law that a contingent fee is contrary to the dignity and position of the profession, and it is only recently that with a growth of commercial concepts in the United States especially this theory of lawyers' lien upon a cause of action for his contingent fee has been admitted into our statute law.

I think about 1834, perhaps I am wrong in my date, in the State of New York a complaint having been made before one of the chancellors, I think it was Walworth, that a solicitor in chancery had, pursuant to a contract for a contingent fee which he had made with his client, withheld the amount of his contingent fee, where he defended on the ground that he had a contract to that effect, the chancellor insisted that he should disgorge the entire amount which he had withheld and said that if the bill were not reduced it would be the subject of disbarment in that court.

Our troubles in this direction are derived from a statute, from interference of the legislature in this matter, and the excuse is always the same—"It is the poverty of the plaintiff"—and the contention that this is the only way for a poor man to secure justice and for a poor man to secure adequate assistance. The fact, however, is that the poverty of the plaintiff never enters as a consideration into the making of these contingent contracts. It may be that poor people are in the great number the victims of such contracts and it may be that it is necessary to afford them service of that kind, but the fact is that the law, the statute law, recognizes no such distinction and does not base the right upon the poverty of the client, and the poverty of the client does not enter into it in any respect except as an excuse for retaining the law upon the statute books, and it is always that argument which prevails.

The State Bar Association of New York had a special committee upon this subject which made a very substantial investigation into it and which reported at intervals from year to year and made recommendations for a modification of our statutes so as to secure the privilege of review and make it sure that the courts had a right to review the reasonableness of the agreement for compensation in every case of a certain character. The

report and recommendations were modified from time to time, but never received any substantial support in the legislature. The legislature is wedded to this statute, the abuses of which are many. It is not an uncommon thing in New York, and I fancy it is not an uncommon thing elsewhere where similar statutes are in force for the lawyer almost from the beginning to be the antagonist of his client. Those who make a business of this sort of charge and who solicit the business in hospitals and the like and who have in times past employed runners and cappers to solicit the business for them, and who have made great fortunes out of it, in many instances, as illustrated by the reports of their efforts to enforce their liens, almost instantly after the making of the contract became the antagonists of their clients, opposing any effort on the part of the client to make a satisfactory settlement.

Of course the explanation is made that they are really looking out for the interests of their clients, that the claim agents of the railroads and other large corporations act in such a dastardly fashion that they are really attempting to protect the interests of their clients.

Be that as it may, it almost invariably takes the shape of antagonism to the client sooner or later where the defendant is disposed to settle to the satisfaction of the client. That is one of the obvious evils which any one can see if he reads the series of reported decisions on this subject.

The New York County Lawyers' Committee in the course of endeavoring to solve the ethical problems that have been submitted it from time to time received this question to which it gave an answer, and it is in that answer that the recommendation is made which can take vital force from the action of this Conference if the Conference sees fit to give it that vital force.

The question, as are all such questions, was specific in its nature and related to a detailed set of circumstances. It was this:

"Is it in the opinion of the committee inconsistent with the essential dignity of the profession for a lawyer to accept professional employment upon contingent fee even under the safeguards mentioned in Canon 13 of the American Bar Association?"

You will remember that that is the canon of our ethics which deals with the subject of contingent fees, and which says:

"Contingent fees where allowed by law should be under the supervision of the court in order that the client may not be imposed upon."

I shall read it a little later in the answer.

"If the committee considers the practice to be as a general rule undignified, or otherwise improper, does the committee recognize as exceptional, first, cases of commercial collections, tax reductions, or tax refunds, and similar cases, in which it appears to be the universal custom to make compensation contingent upon success and measurable by the sum collected, refunded, and so forth; second, meritorious cases of any kind undertaken in behalf of poor persons. Is the propriety of accepting employment on a contingent fee dependent to any extent upon the custom in that regard which prevails generally among members of the Bar in the community where the lawyer in question practices?"

The answer was the subject of very serious debate. It was not disposed of in one meeting. It was the subject of debate and discussion in several meetings of the committee and as finally phrased I shall read it:

"In the formulation of the canons of ethics of the American Bar Association no subject precipitated such debate as Canon 13, the one relating to contingent fees, which reads as follows:

"'Contingent fees, where sanctioned by law, should be under the supervision of the court in order that clients may be protected from unjust charges.'

"Even as it was formulated after the debate, it has not been universally accepted. The Bar Association of Boston adopted instead the following:

"'A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success except when the client has a meritorious cause of action, but no sufficient means to employ counsel unless he prevail, and a lawyer should never stipulate that in the event of success his fee should be a fixed charge of that he recovers, or a fixed sum either of which may exceed reasonable compensation for any real service rendered. Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services are constantly tempted to promote groundless and vexatious suits. Those who go further . . .'"

Let me stop there. I am still reading from the canon of the Boston Bar Association, but so far as my information goes it is practically never that those who solicit this business in hospitals and similar places consider for an instant when they are making their contract for contingent fees whether the suits which they propose to institute are groundless and vexatious or not. I say that and point to a single instance in which the claim was made to our committee where a child who had been injured on the street and was perhaps mortally wounded was taken to a hospital in the City of New York, its parents were summoned and were in the greatest distress over the condition of their child and fearing the possibility of its instant death. Fifteen lawyers called upon those parents in that one afternoon while they were distressed in mind, in that condition, and urged upon those parents their employment to prosecute a suit. I venture to say that not a single one of them had the slightest idea whether the suit was groundless or vexatious or not, and these outraged parents, feeling that they had a proper haven of appeal, brought the question to the Commission on Professional Ethics of the New York County Lawyers' Association with the comment, in substance, that if the profession of law was what it ought to be, such a condition ought not under any circumstances to be permitted. As a matter of fact it is not, when it is brought to the attention of our appellate division.

Resuming the quotation from the Boston Bar Association:

"Those who go further and bargain that if successful their fees shall be fixed sums or percentages are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyers' superior knowledge and experience give him an advantage and rather tempts him to overreach his client. By making it he in effect purchases an interest in the litigation, and in consequence unhappy conflicts between his own and his client's interests in respect to the settlement or the conduct of the suit are always likely to arise. His capacity to advise wisely is impaired. He is beset by the same temptations which beset a party to be dishonest in preparation and trial."

That is the end of the quotation from the Boston Bar Association. The answer proceeds:

"Experience shows that the contingent fee as a general practice in any branch of the law has the tendency to breed the

twin evils of solicitation of employment and improper division of fees. It develops both in the lay and in the professional mind a conception of the practice of the law as a business, not as a profession, and tends to lower the essential standards of the Bar.

"While we recognize that under existing standards each lawyer is largely the judge of the soundness of his conduct in such cases, we think that the time has come for the American Bar in their respective states to reconsider the basis for the existing law upon the subject and to consider whether all contingent fees should not by law be made subject to summary review by a court of the application of the client.

"As to the specific inquiry put by the inquirer, the committee can see no reason for applying any different principles, that is, commercial collections, tax reductions, tax refunds and similar cases, where there appears to be a universal practice.

"As to the second case, that is, a meritorious case of impoverished clients, the committee is of opinion that while the practice of contingent fees finds some justification in meritorious cases undertaken on behalf of poor persons, nevertheless such arrangement should also be under the complete supervision of the court."

I think there will be no question that the cases of greatest imposition are those of poor persons where there is very little service performed, where there is a contract for a large contingent fee, and where the poor person is inclined to settle for what is satisfactory to him and his lawyer interposes obstacles.

"So long as the present practice prevails generally among members of the Bar in any community this committee cannot assume to say that there is any impropriety in lawyers practicing in such community excepting such cases where they are unsolicited."

Of course the greatest evil in connection with these fees is the systematic solicitation of business where the fee is the reward that the lawyer has in mind.

What I have said I have said for your information in respect to the facts that have come to our attention. What I ask you to consider is, whether in the opinion of this Conference the time has come for the American Bar in their respective states to reconsider the basis for the existing law upon the subject of contingent fees and to consider whether all contingent fees should not by law be made subject to summary review by a court on the application of the client and to the end that there may be a specific recommendation for your consideration and discussion

I move, Mr. Chairman, that it is the sense of this Conference that the time has come for the consideration mentioned in the answer of the committee of the New York County Lawyers' Association.

Thomas J. O'Donnell:

When the canon of the American Bar Association was submitted to me by the committee appointed by the American Bar Association to draw the canon of ethics, a committee as you undoubtedly know composed of the most distinguished members of the profession, I took the liberty of disagreeing with that very distinguished committee in reference to that canon and if I could disagree with them then, I should not have to make an apology for disagreeing with my distinguished friends who are advocating the proposition here tonight.

I did not disagree with them because I was then an ambulance chaser or because my business was made up of contingent fees, nor because perchance in my professional experience I had prosecuted a case upon a fee which was more or less contingent. By that I mean a little more contingent than the size of every fee is contingent upon the success of the case, upon the result, and a measure recognized by the courts in innumerable cases.

I took this position. I may say in passing that the committee was good enough to accept some of my suggestions with respect to the canon of ethics, but not this one. The canon requires that you should go before the court and present your case if you are to prosecute the case upon a contingent fee, and I said that necessarily implies that you are going before the court which is to try the case and have an *ex parte* hearing.

James H. Harkless:

The Bar of the country are unanimous, at least a majority of them, that the ambulance chasing and contingent fee business is a very serious and much to be regretted practice. Now we all agree upon that. That I think I can take as settled without discussing it. The question then arises, How are we to handle it? I realize that it is a peculiar situation because the man who takes the contingent fee gets no fee if he loses. If he wins his case he may perhaps get a larger fee than under ordinary circumstances would be allotted to him. He takes the chance of that

contingency. In the fixing of fees in cases recognized as ethically correct, what is it we take into consideration? The result of the case. Our code of ethics tells us, I believe, that in fixing fees we may take into consideration the time involved, the question involved, the ability of the client to pay and the results obtained. What is that but contingency after all? It is contingency.

You must bear in mind that whatever we do with reference to this subject in expressing opinion, the legislatures are going to take care of it anyhow. Of course there is no objection to our expressing our opinion upon it, but I believe that there is a large per cent of the lawyers of this country that will think that we are trespassing upon their right to take contingent fees by making a declaration upon the subject ourselves, and that they might consider, and I think to some extent it might be said they do occasionally consider, that we are getting a little too nice about these subjects.

I happen to belong to the side myself representing the corporations. Clients in Pennsylvania have been so unfortunate as to trust some of their matters to our care and there have fallen into our hands letters, many of them, from the Quaker City of Philadelphia, from New York, and from Chicago, from organizations representing that they had means of prosecuting these cases that were superior to anybody else. They fell into our hands. It is lamentable I know, but what are we going to do about it? Can we prohibit it? Now, if we say in Mr. Boston's resolution, which I am not opposed to, except that if we say that the courts shall fix the contingent fees or supervise contingent fees in damage cases then ought we not also give the right to the courts to superintend and control fees in other cases that are not damage cases?

Charles A. Boston:

I say yes.

James H. Harkless:

That is the question. Now if we get around to that let us see where we stand.

Thomas J. O'Donnell:

Why not all fees?

James H. Harkless:

Yes, why not all fees? Let us get at this sensibly for a moment. If you go into the courts and try a case through and win it and you fix your fee at $10,000 or $5000, now if the fee has not been agreed upon to start with, why should the attorney have the right to fix the fee afterwards without the supervision of the courts? These are material matters and they are germane to this situation and why limit it, Mr. Boston, to the contingent fee if we are to adopt the resolution? I think we ought to be fair enough to put ourselves on record as saying that we are in favor of the court supervising our fees where they have not been fixed.

I am not entirely satisfied that we ought to adopt the resolution. It is a question and I think always will be, as long as we have lawyers and courts.

Moorfield Storey:

I think we are a little confused about this question. It is true in cases such as you have just spoken of that whatever charge a lawyer makes when he fixes it it is subject to revision by the court.

James H. Harkless:

You say it is true?

Moorfield Storey:

Yes, sir. If you make a charge which is too great and retain it out of the sum in your hands the court may compel you to pay back the excess.

James H. Harkless:

Take the case where he has no funds at all.

Moorfield Storey:

Then if he sues for it the court passes on the question of whether it is just or not. In other words, any fee is subject to revision by the court in case there is no contract. What we are aiming at here is the habit of making a contract in advance by which the lawyer is entitled to a certain proportion of the recovery and that contract is set up to prevent the client from disputing the justice of the charge. That is a great abuse and

it is a great abuse because the contract is made between a man who thoroughly understands the situation and a person who is helpless as a rule. If the courts have the right to revise the fees charged by one of its officers in a case where there is no contract, it seems to me that the court should have the right to look through the contract between the parties and determine whether the charge is proper or not. The resolution is because the law now as practiced by the Bar and as justified by statutes in some cases recognizes the justice of that contract, the validity of it, and unless it is unconscionable they will not set it aside, and that is why it is important that a charge under contract and a fee charged without contract should stand alike before the court and both be subject to revision.

There is a single proposition which I gathered from Mr. O'Donnell in which I agree, and that is that the members of the Bar, as he raised it, remaining in Colorado are on the whole decent and respectable. I agree to that. I believe there are enough of them who are willing in the case of a person who is helpless and who has a just cause to see that that person has justice, but what we are aiming at is not the sins committed by the decent and respectable members of the Bar, but the offences committee by those people of whom we are all ashamed.

Now I think that we as decent and respectable citizens ought to have virtue enough to undertake to expel from the profession those people who are engaged in the interstate commerce which seems to prevail in Minnesota. That is all that this resolution asks for. All that you are asked to do is to pass a resolution saying that the time has come when the abuses which have grown up from our having departed from the English system have become so great that it is worth while to consider whether on the whole contingent fees should not be so made so as to make the contract, if it is a contract, subject to review and revision by the court, and that I conceive is essential in order to preserve the character of the profession and to preserve the unhappy people who are the victims of these contracts from the greatest imposition to which they are exposed by men who ought not to be members of this Bar.

Thomas J. O'Donnell:

After consultation, I am going to offer a substitute resolution. It seems to me that this question comes up too suddenly. I move that the Conference take steps to inquire through the state bar associations what abuse, if any, there is of the contingency fee contracts in the various states, and to report at the next meeting.

I offer that as the substitute after conferring with my friend, Mr. Harkless, who wants me to make a motion that a committee be appointed.

Charles A. Boston:

I arise to oppose that substitute. In my opinion it will result in unnecessary delay. The resolution is so framed that it becomes a local question. The matter in its present stage is to be referred to the state local bar associations, where it belongs, and for us to invite them to advise us of the abuses in the community in my opinion will be a futile step. We won't get the advices. The most of the associations inquired of will not have the facilities for giving us statistical information and we will only be able to get impressions and the result of the resolution in the shape in which it has been proposed will be to refer the question to state and local bar associations for discussion in its present form. I urge the members of the Conference to vote against the proposed substitute.

Chairman Root:

The question is upon Mr. O'Donnell's substitute. All in favor of the substitute resolution will say aye.

The substitute is lost. The question is upon the original resolution.

The resolution appears to be adopted. The resolution was adopted.

There are some committee reports. I think it is getting to a time when we ought to have them. Mr. Boston has a report.

Charles A. Boston:

The committee designated this morning to report upon General Ketcham's motion in respect to charging registrants and their dependents for service under the Selective Service Law and

Regulations, and similar provisions, has formulated that resolution in this shape:

"The delegates from state and local bar associations in attendance at this Conference, or members of the Bar of the United States, and in its several communities, should welcome as a patriotic and loyal duty, and should cheerfully assume the obligation to render gratuitously to registrants under the Selective Service Law and those in the military and other forces of the United States in the prosecution of the war all professional services contemplated by the Selective Service Law and Regulations for which the members of the Bar are specially qualified by reason by their professional equipment and experience."

The committee appointed under General Ketcham's motion this morning has formulated a resolution in this shape:

"The delegates are impressed with the thought that the Bar of the United States in its several communities should welcome as a patriotic and loyal duty and should cheerfully assume the obligation to render gratuitously to registrants under the Selective Service Law professional services, contemplated by the Selective Service Law and Regulations, for which the members of the Bar are especially qualified by reason of their professional equipment and experience, and when services of a generally similar nature are rendered to men in the service, members of the Bar should consider it a patriotic privilege to give their advice and professional aid without compensation, but we recognize that there may be extraordinary situations of business and legal complexity to which these observations do not apply."

The resolution was adopted.

Next in order is the Report of the Nominating Committee.

W. H. H. Piatt, of Missouri:

The Committee on Nominations report as follows:

For Chairman, Elihu Root, of New York.

For Vice-Chairman, Moorfield Storey, of Massachusetts:

For Secretary, Julius Henry Cohen, of New York.

Gentlemen, I will put the question. All in favor of ratifying these nominations will say aye; opposed, no. The nominees are unanimously elected.

Chairman Root:

Gentlemen, I thank you. I have great hopes that these annual meetings of delegates from state and local bar associations will

gradually result in a crystallizing of efforts throughout the entire country. I do not think the discussions that we hold here are fruitless; I think they are gradually bringing the representatives of associations in widely separated parts of the country where law is practiced under different conditions, widely varying conditions, to a common understanding of the conditions under which the Bar of different localities perform their work. I think that if we keep on with this series of conferences the effect will be progressive. I feel sure that Mr. Lowell, in his work at Washington for the government, in bringing about the great opportunity for the lawyers of the country to render services which shall aid in our conquering in the war, has been greatly aided by the meetings we have held, and I think that while the results as we see them from year to year are not spectacular, they are gradually laying a solid foundation for the true American Bar, with a real agreement on questions of ethics and upon questions of procedure and of substantive law as well—upon the administration of justice throughout our entire country—and I think that what little we have done is going to make the American Bar more competent to deal with the questions that are going to come after the great convulsion in the world today is over. No one is going to be able to rest on what he learned in his youth when this war closes. New questions, great questions of mighty moment are going to press upon us, and all the lawyers when the time is passed for the sacrifices that we are all now making, and which we are so glad to make in order that we may win the war, and it becomes necessary to return to a government of limited powers, where the individual has no general superiority, but each individual, each officer, has limited and defined powers, we may have a sentiment of the Bar each one conscious to support the stimulus and incitement of a brotherhood of men familiar with the subject with which they deal and resolved that the old American liberty shall return again and forever.

Henry W. Jessup, of Minnesota, is unable to be here and read his paper, but he has sent his paper, which at this late hour the Chair will not ask to have read. If there is no objection the paper will be considered as read before the Conference and filed.

Mr. Jessup's Paper is as follows:

Henry W. Jessup, of New York:

How can the Bar best bring about an authoritative interpretation and application of the principles of legal ethics?

In 1863 the English Bar elected a "Bar Committee," constituted to "collect and express the opinions of the members of the Bar on matters affecting the profession, and to take such action thereon as may be expedient."

In 1894 this committee was replaced by the "General Council of the Bar," a consultative and advisory committee, similarly constituted. Its membership is described by Dean Costigan (Cases on Legal Ethics).

The American Bar is not homogeneous as is the English Bar. It does not lend itself readily to the constitution of a compact and fully representative committee. There is a distinct membership in the Supreme Court of the United States, in the federal courts, and in the state courts.

We speak of an Admiralty Bar, a Bankruptcy Bar. Every state has its own practice and regulates admission to its own Bar. We have specialists in patent law, in probate law, in commercial law, in corporation law, in tax law, and so on.

How can so heterogeneous a Bar then unite in constituting a central body whose interpretation and application of the principles of legal ethics shall be authoritative?

But first, is the object one to be desired? Obviously it is. The report of the Legal Ethics Committee to this meeting of the American Bar Association records the significant fact that a question as to the propriety of given professional conduct was received by the Chairman of the committee requesting an opinion. The same question reached him as Chairman of the similar committee of the state bar association, and the identical inquiry was propounded to the New York County Lawyers' Committee, to Charles A. Boston, its Chairman.

It is conceivable these three bodies might have differed in formulating their interpretation deliveries on the ethical question submitted, in which case the inquirer could have used the one that bulwarked his own view and purpose, and disregarded the others. The same situation might present itself in any state that has similar committees in its local associations.

Uniformity of interpretation is certainly desirable, and can hardly be achieved except through a body having—

1. Knowledge of the subject;
2. Continuity of experience;
3. Facility for full and frequent conference.

The quality of authoritativeness in the field of ethical interpretation must be subjective. It cannot be objectively conferred by mere election. It inheres in the reasonableness and rightness of the views expressed.

The Committee of the New York County Lawyers' Association, first of its kind, empowered to construe and apply the canons, with a membership of 21, with frequent stated meetings, and after convincing specially as well has for a number of years been so exercising these consultative and advisory functions, in response to inquiries received from all over the continent, that it has acquired a representative character, and has ceased to be of merely local status or authority. Dean Costigan cites its answers equally with judicial decisions.

But, the criticism is made, Shall local associations abdicate their own powers? Are they not better fitted to interpret the canons in the light of local practices and customs? Are not Abana and Pharpar, rivers of Damascus, better than all the waters of Israel? The answer is twofold.

(a) Few committees are authorized to interpret the canons.

(b) Only one has won the faith and confidence of the Bar generally by its careful study, and its restrained conservative and impartial application of the principles underlying the canons.

Unless a similar body can be created, out of the Bar at large, and so financed as to ensure frequent and regular meetings, why not use the existing committee, by adoption as it were, and let it, as a "consultative and advisory body" be put in touch with every committee on professional ethics in every local bar association.

With such a clearing house, the work of all these committees can be correlated and made consistent and thus increasingly authoritative.

Moorfield Storey, of Massachusetts:

I think it would be a wise thing for the bar associations of the country to make a report to our Secretary once a year, on perhaps a page of letter paper, saying what reforms have been made

in the various states during the year and what recommendations have been made, so that we may be in touch with what is being done throughout the country.

Chairman Root:

It is moved by the gentleman from Massachusetts, as the Chair understands it, that the various state and local bar associations in the country be requested to send in reports to our Secretary, and that a summary of such reports be submitted by the Secretary to the annual meeting of the American Bar Association.

The motion was carried.

Charles A. Boston:

There was one thing that I overlooked, in reporting at the first session at the Conference for Mr. Taft, and I think it would be very unfortunate if that were omitted from these proceedings, because what has been done in the City of New York, has been, I think, of incalculable advantage to men in the service of the United States, and I do not know that it has been imitated elsewhere. I hold in my hand a small dodger headed "Legal Advice for Army and Navy Men," and reading as follows:

LEGAL ADVICE
FOR
ARMY AND NAVY MEN.

THE WAR COMMITTEE OF THE BAR OF THE CITY OF NEW YORK.
Acting as the Agency for the American Red Cross.

HENRY W. TAFT, Chairman,
LEWIS L. DELAFIELD, Vice-Chairman,
ROBERT H. WILSON, Treasurer,
FREDERICK B. CAMPBELL, Secretary,
MOUNTFORT MILLS, Executive Secretary.

To Army and Navy Men:

The Lawyers of the City of New York, in order to assist the Government in prosecuting the war, and in recognition of their debt of gratitude to the officers and men of the Army and Navy, have provided a means by which men in the service and their families can obtain adequate assistance and advice in legal matters during the war.

HENRY W. TAFT, Chairman,
MOUNTFORT MILLS, Executive Secretary.

APPLY AT THE OFFICE OF THE COMMITTEE,
40 Wall Street, New York City.
Telephone John 2301.

Placards of this kind, printed in all languages, are posted up in the City of New York, and in all resorts where men in the service can see them.

Frank W. Grinnell, of Massachusetts:

I would like to state that last summer about 8000 copies of a similar placard were distributed by the Boston Legal Aid Society, and since then some 70,000 copies have been distributed among the soldiers and sailors in and about the City of Boston. I have a few copies of our placard here, which I should be glad to hand to anybody interested.

Chairman Root:

Is there any further business to be brought before this Conference? If not, I declare the Conference adjourned.

Adjourned *sine die.*

IV.

SIMPLIFICATION OF NEW YORK PROCEDURE.

I.

REPORT OF THE COMMITTEE TO EXAMINE THE PRACTICE ACT PREPARED BY THE BOARD OF STATUTORY CONSOLIDATION.

To the New York State Bar Association:

This committee, appointed pursuant to a resolution of the association adopted January 30, 1914, begs to make the following report:

It is perhaps unnecessary to state that interest in the subject of this report has been to a great extent lessened because the country is so much engrossed by matters more or less directly related to the war. Nevertheless, the Joint Legislative Committee charged with the duty of reporting a statutory plan of procedural reform has made substantial progress. The work of that committee has not, however, advanced to a point where it can be considered as a completed formulation, and comment and criticism must necessarily be confined to certain tentative chapters of a proposed code and to proposed rules of court prepared by it. These, with statements made by the committee as to the manner in which it proposed to carry to completion the rest of the work, afford a basis for a critical judgment of a general character; and your committee is of the opinion that discussion of the work of the Joint Committee even in its incomplete condition will be useful.

At the outset, it must be stated that the Joint Committee has, in the matter of both form and arrangement, departed widely from the lines laid down by the Board of Statutory Consolidation. Notably it has rejected the idea of a short Practice Act. It has, however, approved of many of the substantial reforms embodied in the short Practice Act which was prepared by the board which, in a modified form, was approved by this association. The Joint Committee has also approved the plan of the board for transferring to the consolidated laws certain provisions relating

to substantive rights now contained in the code of civil procedure, but not to the extent proposed by the board. After this general statement of the difference between the plan suggested by the Joint Legislative Committee and that proposed by the Board of Statutory Consolidation, it will be appropriate briefly to recall the position heretofore assumed by this association.

The Board of Statutory Consolidation, proceeding under an act of the legislature of 1913, made a report consisting of a number of volumes. Volume I contained a short Civil Practice Act of 71 sections and Civil Practice Rules, and Volume III parts of the Code of Civil Procedure relating to substantive law which it was proposed to distribute among the consolidated laws. It was announced by the board that short forms of pleading and other legal papers were also to be devised; but these have not yet been published. Concerning the matter comprised in Volumes I and III your committee in a previous report stated:

"The committee is of the opinion that the plan proposed by the board is in its general scope and design scientifically conceived and that generally it has been worked out in detail in an effective and satisfactory manner. The most modern experience in England and this country has been availed of, and a basis for a reform has been produced which promises to be of lasting value. While the committee finds it necessary to make a number of criticisms and suggestions, it does not suggest any material change in the general design of the work."

The committee added that the Practice Act sought to "establish the fundamental principles upon which the reform of procedure in all of the courts of the state is to be founded." It was not, however, satisfied with the form of the Practice Act and it accordingly redrafted it, compressing it into 46 sections. The committee specifically approved of 15 measures of reform of a rather fundamental character which were proposed, and it withheld its approval of four reforms proposed. The changes embodied in the short Practice Act involved reforms of substance; and everything else covered by the reports of the board and of your committee related to matters of form, convenient arrangement, phraseology and indexing. Accordingly in its report to the association in 1917, this committee stated that

"the difficulty in reaching an agreement has been chiefly due to differences of opinion in matters of form and arrangement. Such

criticism, much of it uninformed, has to an appreciable extent retarded the work. Not only many lawyers, but also some judges, have not refrained from making hurtful criticisms before they have given to the general scheme of reform of the Board of Statutory Consolidation the careful attention which it merits. The committee believes that many of such criticisms could easily be removed by changes which would not seriously disturb the important features of the reform."

The committee now believes that this same observation may be made in comparing the report of the Board of Statutory Consolidation with that of the Joint Legislative Committee and that the recommendations of that committee must be given very serious consideration on account of the substantial reforms which they propose.

This committee in its report to the association in 1917 stated that such matters as to whether a suit should be commenced by summons, or whether special terms should be eliminated, were not of vital importance to the general plan, and that associations such as this should give their consideration to "the few general but vital features of the proposed scheme of reform"; and the committee added that it had "become increasingly manifest that very material changes must be made in the form and arrangement of the scheme of the Board of Statutory Consolidation," and that the vital parts of the reform were "the fundamental provisions embodied in the Practice Act, not exceeding two dozen in number," which it believed were "approved by a large majority of the Bar and the Bench, although the form in which they have been expressed has met with general disapproval." The committee then reported in favor of a scheme of reform which should include (1) "a Practice Act embodying a few vital and far-reaching provisions for simplifying the practice and a provision (sanctioned by a constitutional amendment) which should vest in the courts the power to make rules of practice beyond the power of the legislature to repeal or to amend; (2) a code of practice rules to be made by the courts; and (3) a distribution" among the consolidated laws of matters of substantive law. It also favored including in a practice manual certain remedial provisions which had become associated in the minds of lawyers with matters of practice.

Having thus stated the position of this association, we are prepared to take up the general plan of the Joint Legislative Committee. Your committee has been afforded by that committee an opportunity of examining the completed portions of the proposed code and practice rules, and it has also been furnished with a statement of the reforms already approved as well as those which will probably hereafter receive the approval of the committee.

The Joint Committee has been most industrious in ascertaining the views of the Bar of the state, and your committee has no hesitation in saying that its work in examining and analyzing the report of the Board of Statutory Consolidation, and in drafting provisions of a code of procedure and of court rules, has been conscientious, systematic and thorough. If the committee has yielded in matters of form and arrangement to legislative expediency, and has not been as rigid as the Board of Statutory Consolidation and this association in ignoring opposition based upon inertia due to professional habit, and coming largely from parts of the state where the inconvenience, delay and expense of the present procedure is not so much felt as elsewhere, this association should none the less carefully consider whether, under the plan proposed by the committee, there will be a step forward.

Your committee in 1917 referred to a proposal that vital reforms of procedure should be inserted in the code of procedure with such changes as might be necessary to "bring them into proper correlation with the other provisions of the code." The committee commented upon this suggestion as follows:

"This would be a step in advance but a timorous and an inadequate one. The mere existence of the code creates the impression of a complicated practice. The suggestion of retaining it even though improved by the proposed changes, would be unsatisfactory and unscientific; and this association should oppose any such compromise."

This criticism applies to the plan now proposed by the Joint Committee; and your committee adheres to the view expressed in 1917, as it still believes that the plan of the Board of Statutory Consolidation so far as it provides for a short Practice Act and rules of court, if modified and perfected in the manner pointed out in previous reports of this committee, would accomplish a simplification of procedure in a manner more scientific and more

lasting than under the plan proposed by the Joint Committee. But in this connection it would not be fair if we failed to state that the Joint Committee proposes a removal of provisions relating to details of practice from the code to rules of court which is much more extensive and scientific than has ever before been attempted in this state. Indeed, the court rules cover a large number of provisions now contained in the code and, with the power conferred upon a convention of judges to make new rules, they would undoubtedly result in a much greater flexibility than that existing under our present system.

In its report to the Senate of April 25, 1917, the Joint Legislative Committee asserted that there were then in the code 2742 sections and that the actual volume of matter contained in these sections could not be materially reduced by transfer either to the rules or to the consolidated laws; and it added that while the Board of Statutory Consolidation had recommended that many code provisions be repealed, it was still the fact that the number of sections proposed by the board, which were contained in the Practice Acts and the rules, or which were transferred to the consolidated laws, amounted to 2681. Other comparisons were made for the purpose of showing that the reform proposed by the board did not decrease substantially the total volume of enactments. The committee also called attention to the fact that the adoption of a short Practice Act or a system of rules would not prevent amendments to the general practice law of the state. It disapproved the plan of a short Practice Act and stated:

"Your committee is not impressed with the sanctity of a short Practice Act merely because it contains a small number of sections. If we must have in statute form several hundred sections containing similar provisions now in the code of civil procedure, as nearly all admit, the committee recommends that all of such provisions be contained, properly classified and logically arranged, in the Practice Act or code, or whatever the statute may be termed. We would except such provisions as clearly should be transferred to the consolidated laws as substantive law."

The committee adds:

"This committee is of the opinion that the rules prepared by the board contain many provisions which should be statutory. The committee feels that the existing general rules of practice should be thoroughly revised and that many provisions now in the

code might well be relegated to rules of court. The committee is not prepared to recommend the enlargement of the rules to the extent recommended by the board. The question is probably the most important one involved in the suggested changes in practice. Opinions of those members of the profession who have given the subject most careful thought differ widely as to the proper course to be followed."

Referring to the distribution proposed by the Board of Statutory Consolidation of provisions relating to substantive law, the Joint Committee says:

"This feature of the board's work has been generally condemned by bar associations and individuals who have given close study to the subject, and, in the main, is disapproved by your committee."

This statement is in accord with your committee's observation.

The committee then proceeds to state that they had prepared a pamphlet summarizing the more important changes recommended by the Board of Statutory Consolidation and had distributed 10,000 copies to lawyers of the state, with a request that their views should be communicated to the committee. All of these changes were considered at many public meetings at which there was much diversity of opinion expressed; and the Joint Committee adds a comment in which your committee fully concurs, that the Bar of the state as a whole has not "sufficiently informed itself as to the nature of" the changes proposed and "that outside of a few bar association committees and comparatively few individual members of the Bar, no actual study was being given to the work, certainly not the study and close examination which a subject of so great importance demanded."

The committee makes the following summary of the manner in which the suggested changes were received by those members of the Bar who expressed opinions, viz.:

"Among the proposed changes which met with general approval were the following: That the distinction in form between court orders and judge's orders be abolished; that in general a mistake in court, venue, remedy or procedure shall not defeat an action or proceeding; that all parties in interest may be joined; that no action shall be defeated by non-joinder or misjoinder of parties; that there shall be simplification and facility in obtaining evidence before trial; that pleadings should be required to be more definite so as to define the issues; that substituted service shall be simpli-

fied; that all questions of fact involved be disposed of at one trial; that exceptions to rulings on trial be abolished; that an appeal from a judgment shall present all questions of fact and law in the case, including questions involved in intermediate orders; that the order on appeal should state the exact ruling of the appellate court; that the procedure for provisional remedies should be made uniform.

"Among the proposed changes which met with almost uniform general disapproval are the following: That a new or different cause of action may be set up by amendment at the trial; that all preliminary questions must be determined by one motion for directions within 14 days after issue joined; that a jury trial be deemed waived unless expressly demanded in writing within 10 days after the cause is at issue; that a jury may not render a special verdict unless so directed; that interlocutory judgments be abolished; that an appellate court may take additional proof; that a retrial shall only be had of questions with respect to which an error was committed; that on reversal because damages are excessive or inadequate the issues on retrial shall be confined to the amount of damages; that the allowance or disallowance of statutory costs shall be in the discretion of the court or judge; that the meaning of a statute, ordinance or written instrument may be determined by the court before it becomes the subject of an actual law suit.

"Certain other proposed changes while not generally disapproved met with considerable criticism. Among these are the following: That all special proceedings and state writs be abolished and civil action substituted; that orders to show cause be abolished and short notice of motion permitted by the judge be substituted; that short summons to appear be permitted in commercial actions; that all kinds of causes of action or counterclaims may be joined, subject to a direction by the court for a separate trial of any issue; that practically all evidence before trial be taken by written interrogatories only; that original pleadings subsequent to the reply may be ordered; that an early trial may be ordered where it appears that the determination of a motion will involve an examination of the whole merits; that the case on appeal shall present in question and answer form only so much of the evidence as shall be necessary to present the questions raised; that no action or defense shall fail because the party has an adequate remedy at law."

We cannot do better than state in the words of the Joint Committee itself the plan which it has decided to adopt. In the language of its report dated October 25, 1917, with which it reported sections of the code relating to venue, parties, summons and appearance, it is stated:

"First, the committee proposes the enactment of a separate justice court act, a surrogate's act, a court of claims act, a New York City court act and a condemnation law, substantially as recommended by the Board of Statutory Consolidation, and the exclusion from the code of the provisions relating to these subjects. The committee reported to the legislature of 1917 all of these acts except the court of claims act. Such reports are printed and will be furnished on request.

"Second, the committee proposes to transfer to the consolidated laws certain provisions of the code, which are clearly substantive law and may without inconvenience be disassociated from the practice provisions of the code. It also proposes to transfer to the appropriate consolidated laws certain infrequent proceedings, whereby the volume of the Practice Act will be reduced, without occasioning inconvenience. A separate report was made by the committee at the last session of the legislature containing proposed amendments to the consolidated laws, which is also printed and will be furnished on request. The committee may, as its work proceeds, enlarge the scope of this portion of its report.

"Third, the committee proposes to reclassify and rearrange all remaining provisions of the code and the existing general rules of practice. It will follow so far as practicable the subject classification proposed by the board. It will then take up for special consideration each subject as so arranged, consider the changes in respect of such subject which have been suggested, and determine which of the provisions relating to it may be properly included in the Practice Act and which in rules of court. The committee will propose sections and rules upon each subject arranged in sequence for the purpose of preliminary examination. In determining between statute and court rules the committee will be guided generally by the principle of including in statute rights of action and rights arising in the course of an action, and in court rules, details of practice and procedure. The committee will also include either in statute or rule such proposed changes in practice as it may determine to recommend. It will cause to be printed and distributed from time to time the result of its work upon each particular subject.

"Fourth, the committee will separate the statutory provisions and court rules, retaining the arrangement of each under the same subject headings. It will recommend to the legislature the enactment of the proposed statute as a code or practice manual. The committee will propose, that the act take effect at a future date sufficiently remote to enable a convention of appellate judges, trial judges and lawyers, to prepare practice rules supplementing the Practice Act. The rules proposed by the committee will serve as a basis for the action of the convention. If rules are not adopted before the Practice Act takes effect so as to supplement

its provisions the legislature will be in a position to repeal the Practice Act and restore the existing code.

"Fifth, the committee will again recommend to the legislature that upon the adoption of a plan of simplified practice, an official index be prepared to include all practice provisions, whether contained in the code, the consolidated laws or rules of court."

The committee also embodied in its report an outline of the arrangement of the provisions of the code as follows:

OUTLINE OF ARRANGEMENT.

1. Short title; construction; definition.
2. Limitation of time.
3. Courts and judges.
4. General practice provisions.
5. Commencement of action.
   a. Venue.
   b. Parties.
   c. Summons.
   d. Appearance.
   e. Pleadings.
   f. Interpleader.
6. Preparation for trial.
7. Evidence.
8. Trial.
9. Judgment.
10. Appeal.
11. Execution.
12. Provisional remedies.

13-21. Particular actions (arranged by topic).

22. Costs and fees.

The sub-classification under the head of "Commencement of Action" is an illustration of the kind of sub-classification which it is proposed to adopt throughout.

The Joint Committee proposes to report from time to time portions of its work with a view to obtaining the advantage which must result from examination and criticism by members of the Bar and others. Since the work of the committee is incomplete your committee has not undertaken to make a detailed examination of all of the sections thus far reported. It has, however, con-

sidered the general features of the work and has examined particular sections of the code which serve to illustrate the manner in which the Joint Committee is proceeding, and to elucidate the statements quoted above from the report of the committee.

We take up the matters in the order in which they are stated above:

(1) The committee has not heretofore and it does not now report upon the acts governing the justices' court, the surrogate's court, the court of claims, the New York City court and the condemnation law.

(2) The recommendation of the committee that provisions which clearly relate to the substantive law should be transferred to the consolidated laws, has already been approved by this committee and has been sufficiently dealt with in its reports for 1916 and 1917. The Joint Committee at the last session of the legislature made a report containing the proposed amendments to the consolidated laws made necessary by the transfer of code provisions. This committee has not deemed it necessary to make a detailed examination as to the manner in which this work has been done. It is sufficient to say that the plan of distribution is generally in accord with the views heretofore expressed by this committee. The further suggestion that certain infrequent proceedings may profitably be removed from the Practice Act, thus reducing its volume, without occasioning inconvenience, seems also to be wise.

(3) The classification of provisions of the code and of the rules, which the committee proposes to adopt, seems to be logical. It follows the steps in a court proceeding according to the usual order and affords a ready guide to a practitioner in determining the portion of the new code to which he must refer.

The Joint Committee has been guided by the principle of including in statutory provisions what it designates as "rights of action and rights arising in the course of an action," and in the court rules what it designates as "details of practice and procedure." To illustrate the manner in which this differentiation is carried into effect, two or three illustrations may be profitably resorted to:

"(a) In the provisions relating to a change of the place of trial, the provisions of the present code are adopted without substantial

change, although one sentence which was omitted by the Board of Statutory Consolidation as unnecessary, is retained, since in the opinion of the committee there are cases in which its omission would cause great inconvenience. The last sentence of Section 988 of the present code, which was transferred by the Board of Statutory Consolidation to the county law, is retained in the section because the Joint Committee thinks that it relates to a cognate subject; and otherwise Section 988 of the code is preserved without change. But when it comes to the provisions of Sections 986, 989 and 991 of the code, which deal with the demand for a change of the place of trial and the time when it is to take effect, they are all, substantially in their present code form, embodied in a rule of the court, and for the reason, as indicated by the Joint Committee, that they relate to matters which are directory only and, for the purpose of flexibility, should be within the control of the court, and not governed by statutory rule.

"(b) Section 458 of the present code of civil procedure provides for a case where leave is sought to sue as a poor person, Section 459 relates to the allegation of the petition for such leave, and Sections 460 and 462 relate to the order to be entered upon such application. The somewhat lengthy provisions of Sections 459, 460 and 462, which deal with the contents of the petition, the manner in which it shall be verified, and the conditions upon which the order may be made, are all relegated to rules of court, while a brief provision to the effect that 'a poor person whether an adult or infant not being of ability to sue, who alleges that he has a cause of action against another person, may, by order of the court prosecute as a poor person and have an attorney assigned to conduct his action,' is to suffice to establish the 'right arising in the course of an action.' Thus three-fourths in length of the present code provisions are to become rules of court.

"(c) Provisions of Section 416 of the present code relating to the commencement of a suit by summons, are compressed into a section numbered 380, which provides as follows:

"'A civil action is commenced by the service of a summons which is deemed a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon.'

"There are then proposed as rules of the court, to take the place of Sections 417 and 418, and without substantial change, the following:

"'Rule 381. Requisites of summons. The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action, and if it is brought in the Supreme Court, the name of the county in which the plaintiff desires the trial (; and) It must be subscribed by the plaintiff's attorney who must add to his signature his office

address specifying a place within the state where there is a post office. If in a city he must add the street and the street number, if any, or other suitable designation of the particular locality.

"'Rule 382. Form of summons. The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

"'"To the above-named defendant: You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint. Dated ——— —— ———."'"

If the plan indicated in the above illustrations is consistently carried out, the code will be much reduced in volume, while, on the other hand, the rules of court will probably be largely expanded. But it will always be within the power of the courts so to shorten or add to the rules as the requirements of practice may suggest, and there will undoubtedly result greater flexibility.

(4) The plan suggested in the fourth subdivision of the Joint Committee's report is excellent.

(5) The proposed official index, while it relates largely to a purely mechanical matter, is of great importance, and if the index is scientifically prepared it will remove one of the chief causes of confusion and uncertainty under the existing system.

We now take up for consideration the fundamental reforms recommended by the Board of Statutory Consolidation, and embodied in its proposed Practice Act, with a view to ascertaining to what extent the Joint Committee proposes to adopt such of them as have been approved by this association. In considering these we retain the order adopted in the report of this committee for the year 1916.

(1) The board recommended that all proceedings in the courts, excepting those on *habeas corpus* and in the surrogates' court, be designated as "actions" and commenced by summons and complaint. This was approved by your committee. The Joint Committee in part disapproves of the suggestion, its view being that it would be impracticable to change the present form of many special proceedings provided for by statute, but not by the code. The committee thinks that summary relief of some sort is

usually the distinctive feature of a special proceeding and that it would be impracticable to adapt such relief to civil action generally. It is also the opinion of your committee that there is some ground for the objection of the Joint Committee to the proposed change, but that, in any event, the change proposed by the board is not of very great importance.

(2) Avoidance of delay or complication on account of an error in having commenced a legal instead of an equitable action or *vice versa*. This is approved by the Joint Committee.

(3) Provisions looking to an avoidance of unnecessary retrials by giving broader freedom in reserving questions of law and submitting special questions to juries. Such provisions are disapproved by the Joint Committee, and it is stated that they are almost universally disapproved by the Bar. Your committee, nevertheless, believes that if adopted they would go far toward simplifying and cheapening trials.

(4) Giving to the court wide latitude to dispose promptly of issues which may be determinative of the case in advance of a trial of the remaining issues. The Joint Committee disapproves of this proposed change in the practice and states that it was generally disapproved by the Bar. Your committee believes that, while novel in this state, it is in accord with advanced thought on the subject, and has proven to be practicable and useful in other jurisdictions.

(5) The removal of restrictions in respect of the joining in a single pleading of a number of causes of action, counter-claims and defences. The Joint Committee has not entirely approved of this suggestion, but it proposes to extend the rules so as to permit a greater number of causes of action to be joined, especially where they grow out of the same transaction or involve a common question of law or fact.

(6) Wide latitude in joining parties, either plaintiff or defendant, subject to direction as to separate trials, and making the remedy for non-joinder or mis-joinder simple, so as not to cause delay. This proposal is substantially approved by the Joint Committee.

(7) Short pleadings. The Joint Committee does not appear to have dealt with this subject.

(8) The omnibus motion to cover all provisional, preliminary and anticipatory relief. This suggestion is not approved by the Joint Committee, and the committee states that it has met with much opposition from the Bar. The Joint Committee has, however, retained the provisions of Section 768 of the code for obtaining alternative relief and for allowing a party against whom a motion is made to make a counter motion on any subject. It also proposes to provide for the disposition of points of law by motion before trial. The committee expresses the opinion that by these provisions the purposes of the motion for directions will be practically accomplished.

(9) Comprehensive provision for the correction without delay of mistakes or defects in pleadings or proceedings, where they do not affect substantial rights. The suggestions of the board are substantially approved.

(10) Vesting in courts of appeal extensive power to make a final disposition of cases and to confine retrials to such questions as shall have remained unsettled upon a former trial. Upon this proposed practice, your committee in 1916, reported:

"Such courts may ignore errors unless they believe that if they had not been committed the result below would have been different. This applies both to rulings upon evidence and to errors in the instructions of the court and in matters of pleading or procedure. Provision has also been made for the introduction of additional evidence upon appeal where directed by the appellate court and where it may be done without impairing the constitutional right of a party to a trial by jury."

We understand that this suggestion is practically disapproved by the Joint Committee—certainly that part relating to additional proof is not approved. The Joint Committee is of the opinion that the change would not tend to simplify the practice because a question would always remain open as to whether or not the right of trial by jury was impaired by the provision in question. The Joint Committee favors, however, a broad provision for disregarding errors, omissions, defects and irregularities in any stage of the action including an appeal.

(11) The committee does not appear yet to have dealt with the question of rendering supplementary proceedings more simple and effective.

(12) The board and your committee recommended that substituted service of process should be made more simple by vesting power in the court to determine in each case the kind of service which would be most apt to bring actual notice to the person to be served. This suggestion is not approved by the Joint Committee. It proposes, however, to clarify the existing provisions relating to such service.

(13) The board and your committee recommended that costs should be made to rest more largely than at present in the discretion of the court. This is not approved by the Joint Committee and it is stated that it is generally disapproved by the Bar.

(14) The abolition of the demurrer. This is approved by the Joint Committee.

(15) Trial to be had only where it is demanded. This is disapproved by the Joint Committee, and it is stated that it is generally disapproved by the Bar.

The foregoing suggestions cover matters as to which your committee substantially approved the recommendations of the Board of Statutory Consolidation. We now deal with matters which were not recommended by your committee without some qualification.

(1) The summons to appear. This was not approved by your committee and it has been disapproved by the Joint Committee, with the statement that it is impracticable in the rural sections of the state and has been generally opposed by the Bar.

(2) Your committee did not approve a provision recommended by the board for a submission of a controversy without pleading, although it suggested that some provision for arbitration or submission by consent might be devised which would be an improvement upon the present provisions.

(3) Your committee approved a convention of judges and lawyers to frame rules of court. The Joint Committee also approves an arrangement of that general character. The court rules which it proposes to recommend to the legislature will serve merely as suggestions for the consideration of such a convention. The committee proposes that the proposed amendments of the code shall not take effect until such a convention has had an opportunity to adopt court rules. Many of the rules proposed by the Joint Committee, your committee thinks, may be elimi-

nated; but they have been formulated in order that the convention may have them before it for consideration.

(4) The suggestion made by your committee in its draft of a short Practice Act by which it was sought to simplify the taking of testimony before trial, has not been approved by the Joint Committee. That committee proposes, however, a material extension of the right of a party to obtain testimony by deposition within and without the state, unhampered by many of the restrictions proposed by the present code.

(5) The proposal recommended by your committee, with the comment that it had excited some criticism, to the effect that a dismissal of a complaint or a counter-claim at the close of the evidence should bar a new action, is approved by the Joint Committee.

In addition to the above matters specifically dealt with in the report of your committee for 1916, the Joint Committee has dealt with the following fundamental changes in the present practice:

(1) The committee favors the abolition of the distinction between court orders and judges' orders, so far as granting of court orders by Supreme Court judges is concerned. It does not favor the discontinuance of the special term.

(2) The committee favors the abolition of all formal writs as such, believing that in most cases orders of the court are sufficient to perform the function of a writ.

(3) The committee does not approve of the abolition of orders to show cause, and it is of the opinion that such a change is generally opposed by the Bar.

(4) The proposals of the board and of your committee in relation to the joinder and non-joinder and mis-joinder of parties, are substantially approved by the Joint Committee.

(5) The Joint Committee does not approve the proposals for the setting up of new and different causes of action at the trial. It states that the suggestion has met with the general disapproval of the Bar.

(6) The provisions as to specific denials, admissions and statements in pleadings is substantially approved by the committee except so far as it involves the abolition of the general denial, and the committee refers to the fact that the Board of Statutory Con-

solidation by its Rule 183, retained the general denial where the defendant in good faith controverted all of the allegations.

(7) The proposal of the joint board in relation to pleadings subsequent to the reply is not approved because it is thought to be unnecessary.

(8) The Joint Committee disapproves the suggestion to abolish exceptions. It states that there is a question as to the constitutionality of any such change. Furthermore, the committee says that such a change is not approved by a majority of the Bar and is generally disapproved by the judges. The abolition of exceptions in the opinion of the committee would tend to confuse and not to simplify practice.

Although discussion during the past year and further reflection upon the subject has not led to any material change in your committee's views, which were fully expressed in its reports for 1916 and 1917, the committee is of the opinion that it would not fully perform the important duty with which it has been charged without fairly and in some detail bringing to the attention of the association an effort at reform so intelligent and earnest as that of the Joint Committee of the legislature. We have no hesitation in saying, however, that the framework proposed by the Board of Statutory Consolidation for a short Practice Act, supplemented by a code of court rules covering all the details of practice, constitutes a structure more thoroughgoing and scientific on which to erect an enduring reform, than that proposed by the Joint Committee. Considerations of expediency, whether based upon jealousy of the legislative prerogative or upon the inertia caused by objections of practitioners who allow professional preconceptions, or lack of time or of inclination, to prevent them from giving a sufficient attention to the subject, should not be allowed unduly to deflect us from the enlightened path. The number of uninformed or indifferent members of our profession who oppose such a reform as that proposed does not always afford a safe light by which to guide our steps; and we doubt whether the answers to such a questionnaire as that sent out by the Joint Committee were generally found to have served a particularly useful purpose—certainly not if numerical preponderance was much regarded. The Joint Committee itself in spite of its painstaking efforts found that comparatively few lawyers had given the subject the

study which is deserved. The subject is a dry one, and especially at this time. It is not appropriate for a referendum of the Bar or of the Bench. The surest way to secure a real reform is to base it on the scientific method; and the chief responsibility must be assumed by the comparatively few experienced lawyers and legislators who are able and willing to give to it the study, without which the difficulties involved cannot be appreciated or a remedy for defects intelligently devised.

Holding these views, we cannot approve the rejection by the Joint Legislative Committee of the scientific plan for the short Practice Act and court rules devised by the joint board; and yet we would not be understood as belittling the admirable work done by the Joint Committee; and, furthermore, in view of the indubitible advance toward a simplified practice which would be accomplished if the plan of the Joint Committee were adopted, we do not feel that this association should range itself among those opposing it. Except in so far as that committee has failed to recommend a few of the fundamental reforms which we have favored, what it proposes differs in the main from that proposed by the Joint Board and approved by this association only in form and arrangement.

The report of the Board of Statutory Consolidation has not received the approval of the legislature, and it seems reasonably certain that, without important modifications, it never will be. The Joint Committee, on the other hand, has adopted a different plan which, when completed, may prove to be the only plan presented to the legislature. If the times were more propitious it might be possible by arousing public interest in the subject to procure the substitution in place of the project of the Joint Committee, a plan like that of the board, modified and corrected to meet the many sound objections which it has evoked. But your committee is not hopeful that that can now be done; and we are, therefore, probably confronted with the dilemma whether we will encourage the Joint Committee to complete its work and procure its approval by the legislature, or whether we will oppose it, in the hope that we may thus secure something more perfect, both in form and substance. The matter really becomes one of expediency; and having stated the situation, the committee thinks that it resolves itself largely into a question of individual opinion.

A majority of the members of the committee believes that the adoption of the plan of the board, however modified, could not be secured for many years, and that we should bend our efforts to secure within the next two years the substantial reforms embodied in the Joint Committee's plan, and particularly since, if that is done, it may be easier at some future time to secure a form and arrangement of the new provisions more nearly in accord with that devised by the Joint Board.

HENRY W. TAFT, *Chairman.*
C. ANDRADE, JR., *Secretary.*

II.

THE SIMPLIFICATION OF THE MACHINERY OF JUSTICE WITH A VIEW TO ITS GREATER EFFICIENCY.

Extracts from a report to the Phi Delta Phi Club of New York City by its Committee of Nine, Henry W. Jessup, J. D., Chairman:

Part I.—Constitutional Changes.

We address ourselves first to the root of the whole matter; namely, to the inquiry to what extent, and in what particulars, ought the constitution of a state to deal with the administration of justice? What safeguards are essential, keeping in mind the American idea of the threefold functions of government by the people, legislative, executive and judicial? Are any of the present formulæ outworn? Or, on the other hand, has experience shown the superior value of the once-discarded over the experiments of former readjustments?

And if the constitutional provisions are to be purely generic and not specific, then to what extent is that which is specific, but still demands formulation, to be formulated by the legislature, or to be left to the courts themselves?

The American Judicature Society issued in March, 1917, a second draft of a state-wide judicature act, known as Bulletin 7-A, the original bulletin being out of print. In the introductory note the draftsmen of this act commented on the fact that before such an act could become law in any state some revision of the judiciary article of the local constitution would probably be necessary. This would be particularly true in such a state as New York. Certain measures of reform that have been suggested in that state have been met by the criticism of unconstitutionality. This was after an examination extending over a long period of time by a commission called the commission on the law's delays, by the framing of statutes to carry out the recommendations of that commission and by the actual passage of such statutes. They were vetoed on that ground as contravening the scheme of administration of justice embodied in the constitution of the state.

Notably was this the case with regard to speeding up the judicial machine by eliminating the burden laid upon judges of considering procedural and interlocutory matters through the intermediation of masters, appointed somewhat on the English plan. All such proceedings were to be sifted out by them and nothing left to be tried by the courts but issues of fact or of law. This particular measure was vetoed by Governor Odell on the report of the attorney-general that it would deprive justices of the Supreme Court of powers which were vested in them by the constitution. Singularly enough, it has developed, upon search, that this opinion is not on file.

Moreover, in the State of New York, certain courts have become known as "constitutional courts," having been either organized pursuant to some constitutional provision or having been recognized in the constitution as existing courts with a jurisdiction to be preserved unchanged, unless in some cases they were capable of being modified by legislative action, in respect of which express permission for action was reserved in the constitution itself.

Our first task, therefore, and the task of greatest importance is to suggest to the Bar and to the people of the state, by means of a model judiciary article, the three fundamental principles of a complete reform:

(a) A uniform court;

(b) With administrative and disciplinary machinery inherent within that court; and

(c) Provision for reducing the volume of business and rendering the course of justice more expeditious and sure. We propose, therefore, the following judiciary article, each section being printed in bold-face type and the discussion following immediately after each section as the text of our report.

"SECTION 1.—Judicial Power; Re-Constitution of Courts.—The judicial power of this state shall be vested in the court of the State of New York. In this court the people may sue, and without further consent, be sued. Nevertheless, the legislature may provide for a court for the trial of impeachments and for the election and appointment of justices of the peace."

This conception of a unified court is not novel.[1] The State of New York has an elaborate articulation of judicial tribunals. The

[1] See reference in Part II, p. 61, to English Judicature Acts.

Supreme Court is a court of general jurisdiction. It holds special and trial terms. It had a criminal branch formerly known as the Oyer and Terminer, but now superseded by the "criminal part" of the court. It has appellate terms composed of three justices, wherever that term exists, who hear appeals from certain inferior courts. It has an appellate division in each of the four judicial departments where several judges sit in banc and hear appeals from the Supreme Court and from the appellate term in certain cases, and from surrogates' and county courts. There is a court of last resort known as the Court of Appeals, which is itself by the constitution a court of limited jurisdiction, and much of the agitation with regard to judicial reform has arisen by reason of the limitation of the right of appeal to this court of last resort.[2]

There are local courts known as city courts in various parts of the state. With certain exceptions, there is a county court in each county. There is a surrogate court in each county, although in certain counties the same judicial officer discharges the judicial duties of county judge and of surrogate. There are various criminal courts, courts of special sessions, general sessions, magistrates' courts. Then there are, in some of the cities, municipal courts. Each of these various courts or divisions of courts has its special rules and practice, and such of the courts as are of special jurisdiction may be so closely limited, that when a cause has been finally reached for trial and is to be passed upon, it may develop that the court is without power to grant the relief desired and the litigant be refused relief or remitted to another forum perhaps after the statutory limitation has run against his claim. At the same time the courts of general jurisdiction are protected against the consideration of pecuniarily "small" matters that ought to be tried in the lesser courts. This is accomplished by provisions mulcting the litigant with costs if he improperly engage the attention of that court with the settlement of his petty dispute.

This idea of a uniform court, promulgated by the American Judicature Society, has also been urged by the National Economic League of Boston, the Phi Delta Phi Club of New York City, the so-called "Lawyer's Group for the Study of Professional

[2] See Chapter 290, Laws of 1917.

Problems," in New York City, and as long ago as 1909 was recommended by a special committee of the American Bar Association. The proposition is to abolish all the existing differentiated courts of various jurisdictions and to vest the judicial power of the people in a court of the state, into which all these existing tribunals shall be consolidated and taken up, with power, as below noted, to divisionalize itself and set up as many parts of first instance or of appeal, and if necessary, of intermediate and of final appeal, as may from time to time be convenient and necessary. These various parts are always to be subject to the control and order of the court itself, so that whenever a litigant having a claim shall bring another into court they shall find themselves in a tribunal adequate to adjust finally and once for all, their mutual rights, and to grant the remedy adequate for the determination of the controversy.

From the theoretical point of view, there obviously should be no maintainable opposition against this suggestion. The recommendation of the American Judicature Society represents a consensus of opinion from all over the United States of members of the Bar and of students of the law who have given the matter the most mature consideration. The real objections, the rock upon which the reform may strike and founder, are local, personal and selfish. It appears to strike at and abolish existing positions carrying emolument or salary, and therefore it is imperative to state at the outset that it need not necessarily do so. Assuming that there are 200 judicial officers in a given state enjoying different grades of salary as judges of the different courts now existing in that state, it is obvious that such a constitutional reform (adopted by the people and consolidating them all into one court, to be known by a new name or by an existing name of a historic court), can take up into the activities of that court at the outset every existing judicial officer for the term for which he may have been elected, and at the salary payable to him at the time of this evolutionary change. On the other hand, there is an objection on the part of the existing judges of what may be called the higher courts. They now have a differentiation of dignity wholly independent of their larger salaries, which puts them on a plane above and apart from the judges, say, of a municipal or purely local court, and assuming the change to be effected, the various

judges will be put upon a plane of judicial equality in that each will be the judge of a general court having power to grant relief and to hear disputes equal to that of every other judge of that court, save and except as the court itself by the machinery below suggested may assign different members of that court to duties in divisional parts. The jurisdiction of these parts may be determined from time to time by the rules of court rather than by a constitution or by a short practice act.

The answer to this objection is that this very fact will result in raising the standard for the selection of judges, whether by election or by appointment, to a common norm and the period of time for which any incumbents in office may still have to serve at the time the change goes through may be disregarded as negligible in view of the larger results to be ultimately achieved. Assume for the moment that a judge of the municipal court is by reason of the adoption of such a judiciary article by the people of the state made equal in glory to the judge of the court of last resort. At the same time the differentiation of functions may be preserved by the assignment of the one to a division of last appeal and the assignment of the other to a division of dispossess cases or cases involving no more than a given pecuniary amount.

It is proper to say that this committee takes issue here and now with the proposition that there ought to be a poor man's court, in the sense in which that proposition is usually urged. Every tribunal of justice ought to be a poor man's court, that is to say, it should not be intended for any particular class of the community. The equality of justice is not subserved by remitting one man to a tribunal presided over by judges differentiated in honor and in respect and emolument from judges whose services are better paid, who are invested with greater jurisdiction and dignity and who are made available only for persons having controversies involving pecuniary amounts that the poor man cannot expect to control. The only differentiation that is consonant with the theory upon which courts of justice should be administered is one which is related to the expedition of business, so that causes which may be described as "short causes," causes which may be categorized under some generic classification, and are capable of being disposed of with a minimum of research and demand upon the time of either counsel or court, may be tried in such tribunals as

may properly be erected as divisional parts of the court of the state, *i. e.*, causes not requiring the patient research and analysis, which, for example, a long accounting, or similar litigations may require. Nevertheless, if people were to be satisfied that a uniform court were desirable and would result in the better and more speedy administration of justice, the question of relative dignity or compensation of present incumbents of judicial office would have to be disregarded and not allowed to stand in the way of so great a step forward.

"SEC. 2.—Existing Courts Abolished.—All the existing courts, both of record and not of record, are abolished from and after the last day of December, one thousand nine hundred eighteen.

"All their jurisdiction shall thereupon be vested in the court of the State of New York, and all actions and proceedings then pending in such courts shall be transferred to the court of the State of New York for hearing and determination."

This section requires no amplification. It is the corollary of Section 1. It provides for eliminating any possible delay or prejudice to any litigants actually involved in suits or proceedings pending at the time of the change.

However, it is an interesting fact that this experiment of consolidation has already been tried in the State of New York with the most satisfactory results, and that too over almost precisely the same objections as are put forward in discussing this general problem of a unified court. We refer to the change wrought by the constitution of 1894 in consolidating into the Supreme Court the Superior Court and the Court of Common Pleas. Both of these courts existed and had high and honorable traditions, but they were courts of special and limited jurisdiction, and it had developed that there were cases, even with the powers that those courts possessed, where justice could not be effectually and completely secured by reason of the limitations on the power of the courts and of their judges in the cases coming before them. These courts were thus abolished or taken up into the Supreme Court and the existing judges became judges of the Supreme Court, remaining in office for the terms for which they had been elected or appointed, and their salaries were even made to conform to those of the other justices of the Supreme Court residing in the same counties. The judges affected by this change became some of the most efficient members of the Supreme Court Bench and

established reputations for learning and industry and efficient dispatch of justice not a whit below that of their associates on the Supreme Court Bench. The experiment is, therefore, not a new one, and inconveniences and objections are negligible in view of the advantages in efficiency which this one experience and experiment justify us in believing would necessarily ensue.

"SEC. 3.—Divisions of the Court of the State of New York.—The court of the State of New York shall be organized into divisions, to include always a division of final appeal, and such divisions of intermediate appeal and divisions of first instance as may from time to time be necessary."

The divisionalizing of this court is required by the exigencies of judicial business. Such business has heretofore been dealt with by the legislature as requiring the erection of separate tribunals with special and limited jurisdiction; but the overlapping of jurisdictions, or the conflict of jurisdictions, or mistaken entry into one jurisdiction when the remedy desired could only be secured in another, have in great measure been responsible for the complaints against the administration of justice by disappointed or unsatisfied litigants. Under the divisionalization of a court each part of which had full power to grant adequate relief, no litigant having run his course could be thrown out upon the very day of trial on the ground that he was in the wrong court. If under the rules a case should be properly disposed of by a judge assigned to a particular division, and had been reached before a judge in another division, it could be transferred without loss of time or other advantage and be forthwith disposed of.

The discussion under this particular section will turn entirely upon the propriety of providing in the judiciary article itself that there should always be a division of final appeal and divisions of intermediate appeal, on the one hand, and the general proposition that there should be such divisions of appeal, whether final or intermediate, as the court might from time to time by its order prescribe. It is not vital to this discussion that the question shall be disposed of at this time. The Bar and the litigants of any particular state may differ as to whether a party has a right to more than one appeal, or if they agree that every litigant is entitled to one appeal whether that appeal shall be in all cases to the court of last resort. But it is proper to note that the scheme

obtaining in the State of New York for what are called appellate divisions of the Supreme Court (to which appeals except in capital cases must go, and which shall serve as a sort of clearing house for appellate business, so that certain cases can never pass that court, whereas other cases may go up as a matter of right or as a matter of permission) is a scheme not generally obtaining throughout the United States and has resulted in certain cases in the complaint that, in the uncertainty as to whether a case was going to the court of last resort, a particular appellate division might not deal with the case in the same manner and with the same degree of care that they would have dealt with it, had it been certain that the case could go no further.[3] With this criticism of the appellate judiciary, in so far as it involves a charge of carelessness, your committee is not in sympathy and does not endorse the complaint, although it recognizes its existence. The point is that until the adjudication embodied in a judgment or final order of the particular appellate division is rendered, it may not develop whether the case is to be affirmed or reversed, and if reversed whether it is reversed on the law or on the facts, or on both, and the questions that emerge in regard to the right of appeal to the Court of Appeals have become involved in minute refinements of judicial decision. Special books have been written dealing exclusively with this question of appeals, and the whole matter is involved in technicalities beyond the grasp of the ordinary practitioner.

Suffice it to say that the scheme of intermediate appellate divisions and the limitation of appeals therefrom in certain cases was a device put forward in the constitutional convention of 1894 for the purpose of relieving the pressure on the Court of Appeals which was behind its calendar, and has been continued ever since. The arguments in favor of it are that it has resulted in the erection of tribunals of intermediate appellate jurisdiction of the highest dignity, ability and industry; nearly 200 volumes of reports of their decisions have been handed down since the erec-

[3] The finality of the determinations of the Appellate Division and the consequent relief of the Court of Appeals have been emphasized by legislation enacted during the current year which, however, it is not necessary to discuss at length. It is remedial legislation, not curative. It does not strike at the "tap root" of the difficulty and complaint.

tion of these courts, each of these volumes running from 700 to 800 pages. But in certain cases the determination of these appellate divisions, on similar questions, have been conflicting, and there has been no assured method of resolving these conflicts of decision in cases where the particular litigant lacked the inclination or money or right to go to the Court of Appeals. On the other hand the contention of many is that there should be an enlarged Court of Appeals; and the objection to such a court is immediately made that when there have been "second divisions" of this court, or "commissions of appeals" set up, sitting concurrently to relieve it from an over-crowded calendar, there was the same possibility of conflicting decisions, and this possibility was an insuperable objection to the scheme of an enlarged court.

In answer to this contention it may very properly be urged that if there were but one court of last resort and no courts of intermediate appeal, and that court of last resort consisted of 25 or 30 members, then that court should sit in banc, by a majority, on all questions involving the life of citizens or questions of constitutional law, but that other appeals should be classified and categorized and should be heard before divisional parts of that court, consisting of seven or nine judges, three or more of whom should sit concurrently. There would be no conflicting determinations, and in any case that might seem to involve a possible conflict of determination between one of these divisional parts and another, the rules of the court might prescribe that such divergencies in the two cases where the conflict developed should be submitted on the record to the court sitting in banc for its determination, and before the decision was published. To have one court of last resort sitting in parts, and they sitting coincidently, would multiply the output of determinations by that court directly in the ratio that the number of such parts bears to the present single session of a court of last resort. It would eliminate the necessity of the intermediate appeals; it would shorten the time within which the litigant could reach his final determination and it would lessen the cost to the litigant in professional fees and in the cost of preparing records for the two successive appellate tribunals.

But whether there be a court of last resort and intermediate appellate tribunals or only one Court of Appeals, the practical

suggestion is that *that shall be a matter for the general court itself to determine.* It should, therefore, be vested with permissive power to divisionalize itself in the matter of appeals as in other matters as from time to time the exigencies of judicial business might require. The matter ought not to be foreclosed by the constitution itself, nor ought it to be left to the legislature to determine by statutes or amendments thereto made from time to time, perhaps at the instance of parties having a particular axe to grind and a particular litigation which they desire either to end or to carry still further.

In the English Judicature Act there is provision made under which the "Court of Appeal" may sit in divisions and under which

"for all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction and the amendment, execution and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this act, the Court of Appeal shall have all the power, authority and jurisdiction by this act vested in the High Court of Justice."

It was also provided that,

"Every appeal to the Court of Appeal shall, where the subject-matter is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together."

And if any doubt arises as to what decrees, orders or judgments are final and what are interlocutory, the question is determined by the Court of Appeals as a body.

We simply cite these provisions of the English organization in order to show that our suggestions are not unheard of, nor unworkable.

"SEC. 4.—Judicial Departments.—The present four judicial departments of this state are continued, but the legislature may alter from time to time the boundaries thereof, except that the first judicial department shall always consist of the counties of New York and of the Bronx, and the others shall be bounded by county lines, and be compact and equal in population as nearly as possible. The present number of judicial departments shall not be increased.

"There shall not be more than one division of intermediate appeal in each judicial department."

This section requires no amplification.

"SEC. 5.—Chief Justice and Justices.—The court of the State of New York shall consist of one chief justice and of as many justices as there are justices and judges in the existing courts of records, hereby abolished.

"The chief justice shall be elected by the people of this state for a term of ..... years, and may be re-elected for one or more terms. Should the office become vacant during any term, the Governor shall fill it by appointment for the remainder of the term.

"The justices shall be appointed by the chief justice, subject to confirmation by the Board of Assignment and Control."

"No person shall be elected chief justice nor appointed justice who has not been a member in good standing of the Bar of this state for at least 10 years.

"The justices shall serve during good behavior or until they shall have attained the age of 70 years; but any justice who shall have served continuously for 15 years and shall have attained the age of 65 years may apply to the Board of Assignment and Control to be retired, and, upon that board certifying that the reasons assigned by him are sufficient, he shall be so retired.

"The salaries of the chief justice and of the justices and of the official staff and of the members of the Committee of Discipline who are not justices shall be regulated by the legislature, but no salary of any justice shall be diminished during his term of office.

"A justice, whose term of office shall after 15 years of service cease by reason of age or retirement, shall receive an annual compensation equal to two-thirds of the salary he received during the last year of his term.

"The Board of Assignment and Control may certify that the number of justices shall be reduced, and thereafter no vacancy shall be filled until the number shall be reduced accordingly. The number of justices shall not be increased except by the legislature upon application of the Board of Assignment and Control."

It is obvious that this section presents, in the State of New York at least, the most controversial point in this whole report. At the time of the constitution of 1846 the state departed from the appointive and resorted to the elective judiciary system. And from the standpoint of the individual, local electors, the idea is abhorrent to them that they are not competent to select proper and efficient judges of their own causes. And today, as in the days when Rufus Choate made his memorable address to the Massa-

chusetts Constitutional Convention of 1850, when the action of the people of the State of New York was still fresh in the memories of men, it is still true that the most insidious and yet unfair answer to the argument for an appointive judiciary is: Will you not trust the people? As he remarked in his address:

"That is a very cunning question, very cunning indeed. Answer it as you will, they think they have you. If you answer yes, that you are afraid to trust the people, then they cry out, 'He blasphemeth.' If you answer no, you are not afraid to trust them, then they reply, 'Why not permit them to choose their judges?'"

He undertook to solve the dilemma by what he characterized as "a safe general proposition":

"If the nature of the office be such, the qualifications which it demands, and the stage on which they are to be displayed be such, that the people can judge of those qualifications as well as their agents; and if, still farther, the nature of the office be such that the tremendous ordeal of a severely contested popular election will not in any degree do it injury—will not deter learned men, if the office needs learning, from aspiring to it; will not tend to make the successful candidate a respecter of persons, if the office requires that he should not be; will not tend to weaken the confidence and trust, and affectionate admiration of the community towards him, if the office requires that such be the sentiments with which he should be regarded—then the people should choose by direct election. If, on the other hand, from the kind of qualifications demanded, and the place where their display is to be made, an agent of the people, chosen by them for that purpose, can judge of the qualifications better than they can; or if from its nature it demands learning, and the terrors of a party canvass drive learning from the field; or if it demands impartiality and general confidence, and the successful candidate of a party is less likely to possess either—then the indirect appointment by the people, that is, appointment by their agent, is wisest."

The Chief Justice, elected by the people, is their "agent," in the meaning of Mr. Choate's great argument, no less than is the chief executive of the state.

At the same time Rufus Choate called the attention of that convention to the discussions in *The Federalist* (No. LXXVIII, N. Y., June, 1788), in which the purpose of an independent judiciary is vindicated, and appointment during good behavior as the means of such independence is vindicated also, and he had

recourse to observations which strike at the root of the dissatisfaction popularly entertained of such acts of the judiciary as for the moment arrest and interfere with the will of the people, as expressed by their legislatures from time to time, by virtue of that interpretative power vested in the judiciary of determining whether a given statute runs counter to the constitution of the state or of the United Sates. Mr. Choate observed:

"Sir, it is quite a striking reminiscence, that this very paper of *The Federalist,* which thus maintains the independence of the judiciary, is among the earliest, perhaps the earliest, enunciation and vindication, in this country, of that great truth, that in the American politics, the written constitution—which is the record of the popular will—is above the law which is the will of the legislature merely; that if the two are in conflict, the law must yield and the constitution must rule; and that to determine whether such a conflict exists, and if so, to pronounce the law invalid, is, from the nature of the judicial office, the plain duty of the judge. In that paper this fundamental proposition of our system was first presented, or first elaborately presented to the American mind; its solidity and its value were established by unanswerable reasoning; and the conclusion that a Bench, which was charged with a trust so vast and so delicate, should be as independent as the lot of humanity would admit—of the legislature, of the executive, of the temporary popular majority, whose will it might be required thus to subject to the higher will of the constitution, was deduced by a moral demonstration. Beware, sir, lest truths so indissolubly connected—presented together, at first: adopted together—should die together. Consider whether, when the judge ceases to be independent, the constitution will not cease to be supreme. If the constitution does not maintain the judge against the legislature, and the executive, will the judge maintain the constitution against the legislature and the executive?

"What the working of this principle in the national government has been, practically, there is no need to remind you. Recall the series of names, the dead and living, who have illustrated that Bench; advert to the prolonged terms of service of which the country has had the enjoyment; trace the growth of the national jurisprudence; compare it with any other production of American mind or liberty; then trace the progress and tendencies of political opinions, and say if it has not given us stability and security, and yet left our liberties unabridged. . . . ."

It will be recalled that Montesquieu, in emphasizing the necessity for a separateness between the executive, legislative and judicial branches or functions of government, nevertheless

allowed that in the British Constitution, which was his great model, there were certain features which might be described as "co-operation in certain rights" between the various separate branches of authority.

In *The Federalist* Alexander Hamilton interpreted the proposition laid down by Montesquieu as amounting to no more than this, "That where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." And he points out in the constitutions of the different states, that New Hampshire's, which was the last to be framed, recognized "the impossibility and inexpediency of avoiding any mixture whatever of these departments"; and qualified the doctrine by declaring that "The legislative, executive and judicial powers ought to be kept as separate from and independent of each other as the nature of free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity." On the other hand, he points out that the Constitution of Massachusetts declares, "That the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial, or either of them: the judicial shall never exercise the legislative or executive, or either of them."

The Constitution of New York, however, at that time contained no declaration on the subject, but gave nevertheless to the executive a partial control over the legislative, "and what is more, gives a like control to the judicial department and even blends the executive and judiciary departments in the exercise of this control." So that in respect to certain appointments the members of the legislative are associated with the executive authority in the appointment of both executive and judiciary officers. And its court for the trial of impeachments and corrections of error is to consist of one branch of the legislature and the principles of the judiciary department.

Upon re-reading Section 5 above, in the light of the foregoing, your committee hopes that the idea will at once strike the reader that the suggestion here made that the chief justice of a state, the primary judicial officer of the court of the state, being elected by

the people for the primary purpose of appointing the judiciary of the state from time to time, will harmonize the difficulties that at one time emerged through the dedication of the power of appointment to the executive; and at the same time preserve to the people the fundamental right, inherent in our system of government, of dominating the judicial branch of our government by the right of election at its source, and yet preserve the independence of the judiciary by not making them subject to the occasionally arbitrary will of the executive or to the influence of political considerations or emergencies, thus removing once for all partisanship from the serious matter of selection of judicial candidates, in short, of insuring the selection of that type of judges visualized by Mr. Choate in his incomparable vision.

We have given careful consideration to the proposal submitted in 1916 by the New York Short Ballot Organization to the legislature of that state. It suggests nominations to the people by the Governor, four weeks before the time closes for nominating judges. The purpose is to create "a judiciary that is ordinarily appointive (in effect) but with the appointments subject to challenge, and to confirmation or rejection by the people."

The proposal comments on the fact that in the Constitutional Convention of 1915 the fight for a return to the appointive system was lost. But the people rejected the work of the convention *in toto*, so that no such deduction is fair. But every argument leading up to the recommendation of a change in the method of selecting judges applies in favor of our recommendation. We quote only one paragraph to prove this. If you read "Chief Justice" for "Governor" this is shown in Paragraph III, which reads:

"III. A more responsible method of nomination will give to the people better control over the judiciary than they now possess, inasmuch as it is far easier for the people to get the kind of Governor [read: Chief Justice] they want and thereby automatically secure the corresponding kind of judges than it is for them to have to stand guard over their interests in every separate judicial contest amid the confusion of political campaigns. This constitutes in brief our answer to those who allege that we are trying to take away from the people the choosing of judges, a statement based on the superficial assumption that to have an officer *elected* by the people is equivalent to having that officer *chosen* by the people. There are still many who deceive themselves by failing to see that in a given case the appointive way may

be more democratic than the elective way, and it was, of course, this instinctive, unreasoning opposition to cutting out the unworkable sections of the elective list that made the whole short ballot movement necessary. Democracy does not mean having the people *elect* everybody, it means having the people *control* everybody."

What are the practical features of the subject contained in this section?

The election of the chief justice by the people.

In relation to this it may be said that the highest and best result could be achieved if that were a separate election, held in the spring of the year on the expiries of the terms of office. The election of such an officer would engage the attention and interest of the Bar to a degree never before realized and the Bar would exercise its influence and its ability to choose in a manner not at present possible.

No one could hope to secure the nomination to so important an office who was not, equally with the Governor of the state, a man of outstanding reputation and learning, and, additionally, of standing at the Bar. While the duties of his office would be selective and administrative, rather than judicial, under the structural scheme elaborated in these recommendations, nevertheless the position would be the highest attainable by a member of the Bar of the state, in dignity, in influence and importance.

No man, however great his practice or income, could afford to disregard the summons of his brethren of the Bar that he should place himself at the head of this great co-ordinate branch of the government of the state. And so high should be the office in dignity, emolument and influence, that the man of petty disposition, the man purely partisan, the schemer, the politician, the practitioner upon whose career any blot of suspicion or distrust may have rested, could not successfully aspire to or attain it.

It is idle argument to say that to create a chief justice with powers of appointment so far-reaching would be to throw the judiciary into politics. It begs the whole question. If the President of the United States can be trusted to appoint the judiciary of the federal bench, presumably the chief justice of the United States could be similarly trusted, and yet we know that the executives of the nation and of the several states have often made appointments for particularly personal reasons, and the tempta-

tion and the risks of yielding to such temptation would be far greater when exercised by one not committed to a particular career, but still engaged in his progress toward further and perhaps higher political honors and desirous of welding together a support and adherence that will facilitate his further progress. The chief justiceship of the state would represent the consummation of a career, the highest and best gift of the profession, and by the simple device of permitting the chief justice to continue as an officer of the court or of retiring full of honors, any lawyer or judge of ability, though garbed in a cloak of poverty, might still covet and enjoy so high a position.

It must be borne in mind that Section 5 provides that the appointments, by the chief justice, are to be "subject to confirmation by the Board of Assignment and Control."

On the other hand, it is obvious at the outset, that if such a change were to be effected, the first chief justice of a given state would only enjoy this right to appointment in the case of individual judges of the various courts consolidated into the court of the state as their several terms of office to which they may previously have been elected would fall in by expiration or by death; that is to say the power would be, from the very beginning, a limited one and would involve the selection of persons qualified to succeed to the outgoing or deceased judge in the particular tasks to which he may have been assigned, and the duties which he was discharging. Surely a chief justice would be more competent to make more proper selections in the ordinary course than a Governor, regardless of the fact that such chief justice as well as the Governor, might be from time to time the exclusive choice of a party rather than of the people of the whole state. The fact remains, and it ought to be recognized, that in a matter of such importance the Bar of the state as a rule would have little difficulty in selecting the man to whom, above all others, such a gift as the nomination to this office, ought to be proffered.

It may as well be noted in this connection under the subdivision as to serving during good behavior, that it is the theory of this unified court that it shall be self-disciplinary.

We recognize the judge to be a public officer and as a public officer he should be subject to impeachment in the name of the people, *in the same manner as any other public officer.* It is

proper that there should be a court for the trial of such impeachments, but it ought to have its place in that part of the constitution or statutes of the state which relates to public officers, and not in a judiciary article. *The court for the trial of impeachments is not a court of justice; it is a tribunal of the people.* The considerations that move the manifold constituents of that tribunal are usually political. It is only in cases of the utmost scandal, where the patience of the public has been exhausted by the acts of a corrupt and venal judge, that the determinations of such tribunal may be characterized as just and impartial. In many cases the determinations of such tribunals are unsatisfactory, even when they result in driving from the Bench one against whom charges have been preferred. The power to remove from its body an unfit judge for good and sufficient reason, and upon hearing duly had, ought to be vested in the court itself, and we refer accordingly to Section 10 below dealing with the subject of discipline of members of the Bench and of the Bar alike by a board or committee of the court, having jurisdiction exclusively of questions of that character. Apart from such cases, judges should serve during good behavior, and in order that the career of a judge may be a career, he ought to be able to look forward, at the expiration of his service, when he is full of years, to a continuation in part, at least, of the support upon which he has had to rely and not be required to re-enter the practice of the law, rendered precarious by his age, although in many cases it might be rendered profitable by his experience gained upon the Bench. In the State of New York the device of official referees is a recognition of the value and importance of the pension system, although adopted in the face of an outstanding prejudice against any such pension system.

Once the initial step has been taken, the number of judges being at that moment determined by the experience of the people up to that time, and all the existing judges taken up by the process of consolidation into the new court of the state, they will be grouped by the Board of Assignment and Control to the discharge of the various divisional duties which the court itself may have determined to be necessary, differentiating these parts according to their jurisdiction and function and assigning the existing judges to the continued performance of those duties they have imme-

diately been discharging. As these judges die, or their then terms of office expire, the court by the same board may determine that successors need not be selected, thus reducing the number of judges if the amount of business does not require their continuance. But it is provided by the last clause of the section that the number of judges shall not be increased, except at the direction of the people, expressed through the legislative will.

It will be noted, finally, in this connection, that the term of office of the chief justice of the state can be made short. Two considerations lead to this recommendation: First, the office is intended to appeal to the leader of the Bar for the time being, a man necessarily in most cases advanced in years, and upon whom the burden of his office should not be too long laid; in the second place, it recognizes the idea of accountability to the people and that they thereby will be afforded an opportunity in respect of their control of the judiciary branch of their government, to call, through the chief justice, the administration of justice to account at stated intervals by voicing anew their choice of the one through whom that control is exercised.

"SEC. 6.—Annual Convention and Special Meetings of the Justices.—The justices shall convene annually in January to elect the Committee of Discipline, a presiding justice of the section of appeal and presiding justices of the divisions of intermediate appeal, if any be organized in the several judicial departments, and to determine any matters relative to the court of the State of New York that it is within their province to determine. They will also elect one justice from each judicial department to serve on the Board of Assignment and Control.

"The Board of Assignment and Control may at any time call special meetings either of all the justices or of the justices of any judicial department.

"SEC. 7.—Removal or Impeachment of Justices.—Justices may be removed by the Board of Assignment and Control upon the certificate of the Committee of Discipline, specifying the unfitness or unworthiness of the justice requiring such removal and certifying the record of the hearing of the charges against him.

"Justices may also be impeached in the same manner as any other public officer."

This section recognizes the fact that a judge is a public officer. And his impeachment ought to be on the same basis as the impeachment of any other public officer and therefore a court for the

trial of impeachments, if such court is to have power to try any public officer, should have power to try all public officers, and it should not therefore be a tribunal written into the judiciary article, but into the article dealing with public officers. In the very nature of things such a court, if not a court, is a tribunal. It is an unwieldy body. It has powers and limitations which are not general to courts as such. It involves a machinery and makes claims upon the time and service of men whose primary service is to do something else, which circumstance alone is enough to account for the generally unsatisfactory course of its proceedings and the nature of its arbitraments.

"SEC. 8.—Masters.—The Board of Assignment and Control shall have power to direct the appointment of masters to dispose of procedural, interlocutory or supplementary matters, with such powers and for such terms of office as it shall by general rule prescribe, and it may determine the number of masters in the several judicial departments.

"The chief justice shall appoint, subject to confirmation by the Board of Assignment and Control, as masters, members of the Bar in good standing who shall reside in the judicial department in which they are appointed and who shall have been admitted for at least seven years.

"The legislature may prescribe the salaries of the masters, which may vary in the several judicial departments, but, in the absence of action by the legislature, the salaries of the masters may be prescribed and varied by the local fiscal municipal boards in the several counties, upon certificate of the Board of Assignment and Control."

It may appear in studying this proposed section that it diverges from the fundamental rule for the framing of a judiciary article that it shall be generic and not deal with details. This report, however, deals primarily with the jurisprudence of the State of New York. And in this state it has been determined by executive authority, acting on the advice of an attorney-general, that this particular method of speeding up the judicial machine is unconstitutional. Your committee is so convinced of the value and importance of this particular method of expediting justice and of relieving the strain upon judicial officers, that we have inserted it among the sections of a judiciary article although differing from the opinion of the attorney-general above referred to and believing that the same result could be achieved by legislative

enactment, *e. g.*, in a Short Practice Act. The only reason for inserting it in a judiciary article is that these officers must be paid, that their salaries will be a county or state charge and that the fact must not be disguised that from this body of officers, selected in the manner described in this proposed judiciary article, there will develop material available for selection from time to time to fill vacancies in the body of the judiciary itself. Irrespective, however, of these considerations, it is essential that the nature of this reform should be carefully set forth, and we can do so no better than by quoting from an English authority secured by Mr. Choate when he was ambassador to the Court of St. James, for the purpose of aiding the commission on the law's delay, at that time appointed by the legislature for the purpose of considering methods of reform. This commission had analyzed the state of litigation in New York and it had gotten together a mass of statistics, which later and in another form was summarized by Mr. Charles A. Boston in a paper in which he demonstrated that of the bulk of our judicial decisions more than 50 per cent thereof were concerned with matters of procedural and interlocutory detail.[4] In the discussion on legal efficiency above referred to, it was urged that if judges could be confined to the determination of issues and deal with the rights of parties, while all interlocutory and preliminary matters were to be urged and adjudicated before these masters by means of the "summons for direction" and "summons for judgment," as used in England, the greatest step forward in the simplification and expedition of practice would be achieved. Briefly summarized, this system pours into the test tube of "issue joined" the quick solvent of prompt

[4] At the request of the American Bar Association, Mr. Frank C. Smith made an examination of the general digests for the first quarter of 1910 to determine what proportion of the reported cases related to matters of procedure. His report shows that more than one-half of all the points ruled on during that period of time by the State and Federal Courts of the United States related to matters of practice and procedure, and less than one-half of the points to matters of substantive law. The table which he prepared was printed in the Docket for March, 1917, and showed a total of 5927 cases, in which 22,986 points were presented for adjudication, 12,259 of which were points on practice, *i. e.*, adjective law, or 53.32 per cent of which, by comparison, he figured to be an increase of 5.07 per cent.

omnibus interlocutory relief and precipitates at once the "bad faith defendant" or the "hold-up plaintiff" and leaves the pure crystals of definite, specific, *bona fide* issues, with which the court has to deal.

"The preliminary work up to the threshold of the trial is conducted by an efficient staff of masters. They must be members of the Bar, or solicitors, of over 10 years' standing. The position is one of importance and dignity and is highly prized. From the time a writ is returnable until issue is finally joined, the masters deal with the proceedings, and it is impossible to overrate the efficiency, celerity and usefulness of their work. If a defendant fails to enter an appearance the plaintiff may take his judgment before a master. If the plaintiff is suing for a liquidated sum, for a tradesman's bill, for instance, or upon a promissory note, or even for the rent of premises, or the possession of land, he may endorse upon his writ the nature and amount of his demand. Immediately upon the entry of appearance by the defendant, which must be within eight days, the plaintiff may take out a *summons for judgment,* which is returnable in four days. This summons is heard by a master and immediately disposed of, the evidence being confined to a brief affidavit by the plaintiff that the money sued for is due and payable and that the defendant has no defence to the action, and the affidavit of the defendant stating his defence. If the master is of opinion that the defendant's affidavit does not disclose a meritorious or substantial cause of defence he at once gives judgment for the plaintiff. If he is of opinion that the defendant has some answer to the plaintiff's demand three or four courses are open to him: (a) He may, if the parties consent, try the case himself, in which event the hearing will be without pleadings, and upon oral evidence, in the master's private room; or (b) he may, whether the parties consent or not, put the case in the 'Short Cause List,' to be heard, probably during the ensuing week, by a judge in open court, and in this case also, without pleadings and upon oral evidence; or (c) he may give leave to defend upon the condition that the defendant forthwith pay the sum in dispute into court, or unconditionally, and in such case the action will take its usual course.

"It will thus be seen that in every instance where a plaintiff is suing upon demand of this nature (and in every country the bulk of litigation must be of this character) *final judgment may be obtained within from two weeks to a month from the date of the service of the writ.*

"In all other actions on contract, and in tort, the plaintiff is compelled before taking any step in the action, other than an application for an injunction, or for a receiver, or the entering of judgment in default of defence. to take out a "*summons for*

directions." This is returnable within four days and is heard by one of the masters, who has power thereon to direct whether or not there shall be pleadings, and the place and mode of trial, and also whether there shall be 'particulars,' admissions, discovery, interrogatories, inspection of documents and commission for the examination of witnesses. All of these things are open to the application of either party and are granted or refused in the discretion of the master. If he directs pleadings he may at any time subsequently, if he is of opinion that such pleadings do not sufficiently state what the respective parties' contention will be at the trial, order that particulars be given of any averment. For example, if an agreement is alleged he will order that its date be given, and whether it was oral or in writing, and if it is oral who it is alleged it was made between, and if in writing that the document be identified.

"The master has also power to order each party to make a list of all documents in his possession which are material to any question in issue in the action, and to permit his opponent to inspect and take copies of such documents. This disclosure is technically known as 'discovery of documents,' and undoubtedly tends to save expense and shorten litigation. The master may, furthermore, order either party to answer on oath before the trial certain questions submitted by his opponent, upon the terms that if the party to whom the interrogatories are addressed is the plaintiff, the action be stayed until he answers them, or, if defendant, that, in default of answering, his defence be struck out.

"Finally the master has power upon the application of either party to strike out the whole or any part of a pleading which he deems irrelevant, or he may give leave to enter judgment if the defendant by his defence admits the statement of claim.

"The proceedings before the master are of the simplest kind. He sits behind an office table in his room, and the solicitors or counsel who appear to support or oppose summons, stand before him and argue their points in a conversational tone. In this business-like way he gets through 20 or 30 cases in the course of a day, and although his decisions may involve summary judgments for thousands of pounds, his orders are made while the parties are before him, being endorsed upon the summons itself. There is an appeal from him to a judge who sits in chambers to hear such appeals, but in the great majority of cases the decision of the master is final."

It is hard to add anything to the definiteness of this description. It must be frankly stated that one of the addresses made before the New York State Bar Association in Brooklyn in 1917 pointed out certain respects in which the system in England was not working to complete satisfaction. But in the metropolitan

districts of the state at least, where the congestion of business is the most notable, the permission to appoint and use such masters is, in the judgment of your committee, essential to a scheme of reform, and it ought not to fail of being made available by any sin of omission on our part.

"SEC. 9.—The Board of Assignment and Control.—The administrative business of the court of the State of New York shall be conducted by the Board of Assignment and Control composed of the chief justice, the presiding justice of the section of appeal and of one justice from each judicial department elected annually. Every power adequate to that end is hereby conferred upon it.

"It shall promulgate rules for conducting the judicial business of the court of the State of New York, and may prescribe common forms for use therein. In the absence of action by the legislature it may prescribe rules of evidence. It shall from time to time define the number and jurisdiction in civil or criminal matters of the several divisions of the court of the State of New York and prescribe the parts and terms thereof, and assign justices to serve therein.

"It shall act without delay upon all appointments of justices and of masters made by the chief justice under Sections 5 and 8 hereof.

"It shall provide for the appointment of the official staff of the court of the State of New York, except that each justice may, subject to its approval, appoint his own private secretary and confidential attendant.

"It shall prescribe requirements of character and attainments for admission to the Bar, including the oath of office, and shall admit those applicants who shall comply therewith.

It shall certify annually to the legislature such judgments against the people of this state as may require an appropriation.

The chief justice shall be the Chairman of the Board of Assignment and Control."

By this section the great judiciary system of a state is made self-administering. The people control the purse strings, the local supervisors or a board of estimate and apportionment together with the legislature control the budget and can limit extravagance, but in the matter of making the court machinery efficient and to that end having the power to control and regulate the conduct of every unit in the working force, the judiciary system is put upon a business basis. The only question is whether or not civil service rules ought not to yield to the operation of such an administrative system, for in a matter where the rights

of a community are involved, the right of a man to a job under some hard and fast civil service regulation ought to yield to the public convenience. The head of the police force, for example, dismissing a subordinate for disobedience or inattention to duty, ought not to be compelled on a writ of *certiorari* to reinstate such insubordinate subordinate, for both discipline and efficiency are thereby very seriously impaired. It ought not to be impossible to adjust the operation of a reasonable civil service system to the efficiency of a court which, after all, in its ultimate analysis, is an agency of the community for the administration of justice, and not merely a forum or amphitheater for the settlement of personal disputes.

"SEC. 10.—Committee of Discipline.—The justices shall elect annually a Committee of Discipline composed of five justices and of two members of the Bar who shall have been admitted for at least 15 years.

"The Committee of Discipline shall maintain discipline among the justices, the masters, the official staff and the members of the Bar, and, for that purpose, shall have power, after due hearing, to censure, either privately or publicly, fine or suspend any master or any member of the official staff or of the Bar, to remove any master or any member of the official staff, to disbar any member of the Bar, and to recommend to the Board of Assignment and Control the removal of any justice.

"The chief justice shall be *ex officio* a member of the Committee of Discipline, and shall be its chairman."

Here again we have the same feature in its more specific aspect. The judicial body corporate is given the power to purge itself of unfit and unworthy membership. The advantage of a self-disciplining machinery over the unwieldy and dilatory process of a trial before a court for the trial of impeachments lies in the fact that in the majority of cases of a judge against whom it was charged that he was unfit, for whatever reason, to continue to administer justice in the community, he might be prevailed upon by the Committee of Discipline, except in the most flagrant case, where the disciplinary proceedings should take their full course, to resign and to avoid the scandal incident to the prosecution of a public officer for conduct unworthy of his office. It might be said, on the one hand, that no plan should be supported that would enable such scandals to be hushed up and that it is a great object lesson to the community when any representative body of its

citizens rebukes and eliminates from its membership one who has been guilty of unworthy conduct. On the other hand it may be asserted that one such experience is sufficient as an object lesson in any one generation. But the object lesson loses its entire value and validity if it results in the particular complaint being resolved into a political contest and into an alignment of votes on the question of unfitness, conditioned, not only by the facts of the case, but on partisan or other political considerations.

In the second place, it should be noted that this Committee on Discipline is to consist not only of justices of the court, but of members of the Bar, and is to have power to deal with members of the Bar who are accused of unprofessional conduct. As a matter of interest to readers outside of the State of New York, it may be noted that the activity of certain committees of the Bar in the city of New York since the date of the promulgation of the canons of the American Bar Association has been most commendable, *but at the expense of these associations,* in weeding out from their membership, on complaints made upon the proper judicial authority, men accused of various forms of professional misconduct, so that for this particular period there has been an unusual number of decisions in the reports of the State of New York of attorney cases, resulting in censure, suspension, disbarment. In many cases there has been a complete vindication and rehabilitation of the accused lawyer, for it is equally the function of such a disciplinary tribunal to protect the honorable and reputable member of the profession against injury or hold-up attacks as to rebuke and punish the man who has violated his oath of office.

In the third place, it may be stated that once we concede that the judiciary of a state is to be a great business administrative body with a primary duty of administering justice, but with these necessary, co-ordinate and subordinate functions and duties, then it becomes proper to contend that there may be men appointed to the judiciary for the express purpose of being assigned to these administrative or disciplinary functions, so that the judges constituting the Board of Organization and Control, or the Committee of Discipline, may be assigned upon their appointment specifically to these functions and may never have to sit at all, except in emergencies, in the trial of causes, or in the hearing of appeals. It is obvious on the other hand that judges who have

"done their bit" in the trial of causes or in the appellate work of this court may on passing the age of 60, with their ripe experience and acquaintance with the members of the Bar in our particular community, be assigned to the execution of these governing and disciplinary powers and relieved of the confinement and stress of the daily court work, and may in this way perhaps, render to the Bench and to the profession the supreme service of which they are capable.

"SEC. 11.—Justices of the Peace.—The legislature may provide for the election or appointment of justices of the peace throughout this state except in cities of the first and second class, and may prescribe their jurisdiction and a method of reviewing their acts, but the powers of the justices of the peace shall in no case be greater than the powers of the existing courts of the justices of the peace, hereby abolished."

The insertion of this section is apparently inconsistent with the general scheme of the whole proposed judiciary article, and yet it is an essential part of a satisfactory judicial scheme.[1] And this is so because of the very reason suggested by our observations above with regard to the tendency to erect rough-and-ready tribunals for the expeditious settlement of disputes between members of the community. It is very much in line with the rules of the New York Municipal Court above referred to, providing for the arbitration or conciliation of controversies. The justice of the peace is an institution rather than a tribunal. The powers that are conferred upon him by the legislature enable him to assist the machinery of government in the imposition of fines, and he acts as a shock-absorber to the courts in his ability to dispose in a rough-and-ready way of controversies which might otherwise assume larger proportions, and engage the time and attention of more important functionaries. In rural communities, where the courthouse is not easily available to those residing in a large county, the resident justice affords a method of dealing with petty and irritating disputes that has on the whole proved satisfactory in the experience of the community. At the same time it must be conceded that providing for such justices of the peace in a con-

[1] See article in the September, 1917, issue of the Annals of the American Academy of Political and Social Science (pp. 189-195) by Herbert Harley, relating to these functionaries, and how their efficiency may be increased.

stitutional, judiciary article of the nature here propounded, is only warranted logically in a permissive form. It is obvious that the legislature in providing a method for reviewing their acts would naturally, as they have done in the case of workmen's compensation acts, impose upon the Supreme Court or the court of the state in its proper appellate division or part, the duty of correcting such errors as might be permitted to be taken up on appeal.

"SEC. 12.—Statutes, Decisions and Judicial Statistics.—The legislature shall provide for the speedy publication of all statutes and of such decisions and judicial statistics of the court of the State of New York as the Board of Assignment and Control may from time to time require by its certificate to the Secretary of State; but all statutes and decisions shall be free for publication by any person."

Some of the more far-sighted of those who have been working for reform in the administration of justice have insisted that the collation and publication of information in regard to the business of the courts, as with regard to the performance of duty by any other servants of the public, will itself result in a better administration and in so far as it has been possible in various communities to secure the publication of judicial statistics, in identical degree the courts themselves, confronted with the result of their labor and contemplating the residuum of work undisposed of at the end of a definite period have devised the means and machinery for expediting the discharge of their duties and making the courts more efficient. Therefore this is a most vital clause in the suggested plan of readjustment.

"SEC. 13.—Present Justices and Judges.—The justices and the judges of the existing courts of record, hereby abolished, shall become justices of the court of the State of New York to serve for the remainder of the terms for which they have been severally elected or appointed, during good behavior, and with such duties as may be assigned from time to time to each by the Board of Organization. The present salary of no such justice or judge shall be reduced during the term for which he has been elected or appointed."

The only question in regard to this section might arise in the provisions that the judges taken over from the existing courts for the terms for which they were elected by the people might be unfavorably affected by the words, "during good behavior," and

be subjected to a new disciplinary process which might terminate their enjoyment of the office before the expiration of the term for which they were elected. Assuming but not conceding this to be true, it is better that there should be a possible case where it might be claimed that the right of the judge to the office had been in some way violated and that he should have some claim for compensation, if he could find a court to endorse and effectuate such claim, after he had been removed for misconduct, than to amplify, enlarge or make too specific the section of the new constitution.

If the people have the power by an amendment of the constitution to abolish a court, to consolidate several courts, or to create new courts, it is obvious that by the same power they may terminate the enjoyment of office by existing officials. The supposed case is not likely to occur, but in order that the court may readjust its new business and continue unhindered the disposition of existing business and equally in order that it may divisionalize its various functions so as to dispose of all grades of judicial business engaging the attention of all the consolidated courts at the moment of their change, it is fitting and appropriate that all the existing judiciary should be taken up into the new court of the state.

"SEC. 14.—The Board of Organization.—The chief judge of the existing court of appeals and the presiding justices of the several appellate divisions of the existing Supreme Court, or their successors, together with three members of the Bar who shall be in good standing and shall have been admitted at least 15 years and who shall be appointed by the chief judge of the existing Court of Appeals, are hereby constituted the Board of Organization which shall consolidate all the existing courts of this state into the court of the State of New York.

"It shall adopt a seal for the court of the State of New York, shall transfer to the court of the State of New York all the business and record of the existing courts, and shall assign such of the clerks, officers and attendants of the existing courts to duty in the court of the State of New York as may be requisite to preserve the continuity of the existing judicial business.

"In organizing the court of the State of New York, it may exercise any or all of the powers hereby conferred on the Board of Assignment and Control, and it shall continue in office until the Board of Assignment and Control shall be organized. It may appoint a secretary and employ all necessary legal and clerical assistance.

"The chief judge of the existing Court of Appeals shall be the chairman of the Board of Organization."

This section is a section of temporary operation, but absolutely imperative. There must be some body charged with the duty of effectuating the transfer of business, the organization of the court and the adoption of a seal, the assignment of clerks, officers and attendants, the doing of any act "requisite to preserve the continuity of existing judicial business."

"SEC. 15.—Procedure.—The statutes regulating the organization and procedure of the existing court and the rules of the several existing courts shall become rules of the court of the State of New York, subject to the provisions of Section 9 hereof, but the said statutes as statutes are repealed as of the last day of December, one thousand nine hundred eighteen.

"The Board of Organization shall promulgate a schedule of statutes and rules hereby repealed."

This section presents the nexus between this constitutional article and the change in practice and the regulation of business, more summarily discussed in the closing part of this report, namely, the Short Practice Act and the rules of court.

It is of course assumed that when it is provided that the Board of Organization shall promulgate a schedule of statutes and rules hereby repealed that that carries with it the force of employees and the expenses necessary for the expeditious promulgation of such necessary schedules and this is involved definitely in the next section, Section 16.

"SEC. 16.—Expenses of Organization.—The legislature shall provide for all the expenses incident to the organization of the court of the State of New York and to making effective the provisions of this article."

This section requires no argument in support of its reasonableness.

PART II.—SUGGESTIONS FOR A SHORT PRACTICE ACT.

From the foregoing suggestions with regard to matters of sufficient permanent importance to be set forth in a constitutional judiciary article, we pass to the second stage of this report, *i. e.*, what matters of procedure may properly be left to the control of the legislature as representing the people rather than committed to the courts for their regulation and development from time to time, that is to say, what ought a Short Practice Act to contain in contradistinction to rules of court.

From one point of view this is the most difficult task before the Bar. It may be that the American Judicature Society has so considered it, because, having framed a general Judicature Act and being now engaged in formulating rules of general applicability, it proposes as the last stage of its service to the profession and to the community, to propose a model Short Practice Act. This committee has had the advantage of considerable material, but the wealth of it available has merely proved the magnitude of the task.

The English Judicature Acts, beginning with the Supreme Court Judicature Act of 1873, 36 and 37 Vict., Ch. 66, marked a most interesting step in the evolution of the simplification of practice by the unification of courts. It consolidated into the Supreme Court of Judicature in England the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Westminster, the Court of Exchequer, the Court for Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, and divided the new court into two "permanent divisions," one under the name of "Her Majesty's High Court of Justice," which, it was provided, "shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned," the other, "Her Majesty's Court of Appeal," which was "to have and exercise appellate jurisdiction with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal."

A member of the New Jersey Bar[6] rendered a considerable service to that state by contrasting the courts and procedure in England and those in New Jersey with a view to the enactment of the Short Practice Act of New Jersey. The Connecticut Short Practice Act is probably as concise as any in operation. There has also been promulgated in the State of Illinois, "An Act in Relation to Practice and Procedure in Courts of Record."

The Rodenbeck Commission in New York, in its report hereinbefore referred to,[7] drafted a Civil Practice Act of 71 sections, which has been subjected to very careful and, in the main, sympa-

[6] Hartshorne, *Courts and Procedure, England and New Jersey*, published by Soney & Sage, Newark, New Jersey, 1905.

[7] Vol. I, 1915.

thetic examination and criticism—in particular, by a committee of the New York State Bar Association in 1916. With the following preliminary statement we are in hearty accord:

"The present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment."[8]

The most helpful, interesting and valuable examination and criticism was made by a subcommittee of the "Committee on Practice and Procedure in the Supreme Court" of the New York County Lawyers' Association, of which Mr. Max D. Steur was chairman, which drafted a Short Practice Act of 56 sections. Your committee deems this draft of sufficient importance to annex it as an exhibit to this report, marked "A." For the purpose of this discussion, however, and to support our contention that any such act must be less specific, we venture to call attention to Sections 20 to 29, inclusive, which relate generally to examinations of parties and inspections of documents before trial within or without the state, and contain nearly 1400 words.

Each of these sections is in itself concise and specific and presents a particular phase of the subject-matter covered, but in our judgment it is too voluminous and too specific. Having the force and operation of a statute the mere fact that it is provided elsewhere in the same statute that it shall be "liberally construed" will not alter the fact that, as with similar provisions in the past, procedural statutes are usually construed into refinements, elaborated into particulars that have led the legislature to enter upon a career of amendments and supplements that soon swell the original compact statute into an unwieldy code. We start, therefore, with the premise that in our proposed constitutional article there has been provision made for the appointment of Masters or Supreme Court Commissioners before whom the preliminary, interlocutory or supplementary procedural motions shall be brought on by summons for direction and disposed of by "omnibus order" under such general rules as the court of the state may promulgate.

[8] Report of the Board of Statutory Consolidation of the State of New York, on a Plan for the Simplification of the Civil Practice in the courts of this State (1912).

If such provision be made in the constitution and such rules be promulgated, then these sections of a Short Practice Act need not be so elaborate or specific and in the master's office all the details of the necessary orders to be entered can be all disposed of under the "omnibus order" and on the return of the summons for direction. If this be possible, then, so far as the Short Practice Act is concerned, its provisions could be embraced within one broad, comprehensive section.

The object of being general rather than specific in such sections of a Short Practice Act is that the court by its rules may deal with details and conform them to the curing of abuses that develop from time to time. Punitive costs, perhaps imposable on the attorney jointly with the client, will operate as strong deterrents to abuses.

It must of course be conceded that conciseness is not always consistent with comprehensiveness, nor is it necessarily synonymous with clarity. The point, of course, for statute-makers is primarily: What do you wish to accomplish? And in respect to certain statutes it is more important to make your meaning clear than compact. But, if we once concede the propriety of a court's making procedural rules, then we must concede the impropriety of carrying too much detail into a Short Practice Act. Such an act alone is not a cure-all. A friend recently told the writer that even in Connecticut it took five months after the first pleading was served before the issue was finally joined and ready to be tried by the court. It is of itself alone no guaranty, therefore, against the law's delay.[9] A lawyer determined to gain time for his client it appears can do so even under a Short Practice Act. We respectfully submit that under the operation of the scheme of masters no such delay could be secured, if the master were alert, conscientious and keenly aware of the dignity and importance of his office. But we are satisfied that the Short Practice Act recommended by the subcommittee of the New York County Lawyers' Association is an improvement upon prior models, so far as the State of New York is concerned, but we urge that a sympathetic and intelligent blue pencil could accomplish in several other of the sections a satisfactory condensation in volume.

[9] See article published by Mr. Martin Conboy, of the New Jersey and New York bars, on the operation of the New Jersey Act. Annals of American Academy of Political and Social Science, September, 1917.

The inquiry must be when the legislature comes to deal with the enactment of a Short Practice Act, "To what extent shall the people through their representatives in the legislature let go of their control of the administration of justice?" The unfortunate feature of this inquiry is exactly the same as was pointed out by Mr. Rufus Choate in discussing the question of an appointive judiciary. The rights of the people to control are not to be divested. The people are simply committing to trained and intelligent agents, to wit: the judiciary of the state, the doing of this specific task of regulating procedure. The people are vesting in public service commissions and workmen's compensation boards and in other boards and agencies, their various powers of regulation—some powers quasi-judicial, some in aid of the executive, some purely administrative—but all of them powers intended to be intrusted to efficient instrumentality and for the purpose of having the *people's work efficiently done.* It is on precisely the same theory that we contend that the judiciary with the assistance of the Bar is more competent to devise and to administer, and to keep up to date, methods of judicial administration.

We plead, therefore, for a minimum of legislative regulation through a Short Practice Act. We plead for a minimum of specific sections in such an act. We urge that it will be unfortunate if into such an act is written more than the skeleton of practice, its mere essential bones—for the moment that the act deals with anything that might be described as the muscles or the arteries or the veins of the procedural body, then there will grow up litigation, urging that the legislature intended by the inclusion of a provision in this particular respect in the *act* to divest the court of the power of regulating it by its *rules.* Our recommendation in respect to this matter of a Short Practice Act generally, with particular reference to the State of New York, is that the legislature on the advice of the bar associations of the state which have already given more than customary attention to this very subject, should enact a Short Practice Act and that thereupon the New York associations of the Bar should await the uniform Short Practice Act to be promulgated by the American Judicature Society and then should co-operate with the committee of the American Bar Association on uniform state laws and in the conferences of that association with other bar associations

should endeavor to secure throughout the United States the enactment of a Uniform Practice Act.

Theoretically, there is no reason or justification for a differentiation in practice between the state and federal courts, or between the courts of New York and the courts of New Jersey, or the courts of Massachusetts and the courts of California. The ingenuity of the Bar and a general national spirit could even reconcile the difficulties inherent in adjusting the practice of Louisiana to that of Ohio. The Bar of the country cannot render a greater service to the nation than by enlisting heartily and sympathetically in a movement for a uniform practice in all the courts of the land. This will do more than any other single influence to create a nationalization of the people of the various states and without the loss of a single substantial right.

It may be that the citizens of various localities are entitled to certain rights and remedies as against aliens, but if local litigants are protected by adequate provisions for security for costs against long-distance opponents, there is no reason why American citizens dealing with one another in their business interests throughout the land should not find uniform and homogeneous tribunals of justice open to the adjustment of their disputes in every state of the Union. As it is (to take but one illustration), a man may have practiced before the Court of Appeals of the State of New York for 40 years and may never have had occasion to go to the Supreme Court of the United States in a federal case. And he may be as ignorant as the merest law student of how to secure a writ of error and how to print and prepare his papers. It is this very differentiation which makes it important and necessary for the protection of litigants that although a lawyer may have been a member of the Pennsylvania Bar for 30 years, he cannot now be admitted to the Bar of the State of New York except upon conditions insuring his familiarity with the New York practice extending over a specified term of years. This is, of course, irrespective of the courtesy extended by local courts of hearing counsel admitted on a motion *ad rem*.

We offer two illustrations to show the unwisdom of having procedural matters controlled by legislative enactment:

Illustration No. 1.

In 1896, Section 803 of the New York Code of Civil Procedure read as follows:

"SEC. 803.—The Court May Direct Discovery of Books, etc.—A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy of a book, document, or other paper, in his possession or under his control, relating to the merits of the action, or of the defence therein."[10]

In 1896, and down to the present time, Section 804 of the Code of Civil Procedure read as follows:

"SEC. 804.—Rules to Prescribe the Cases, etc.—The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act."[11]

In 1896, subdivision 3 of Rule XIV of the general rules of practice was amended to read as follows:

"3. Either party may be compelled to make a discovery of any book, document, record, article or property in his possession or under his control, or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial."[12]

As early as the year 1901, in the case of Auerbach *vs.* Delaware, L. & W. R. R. Co. (66 A. D. 201 [Fourth Department)], it was held that in enlarging the scope of this rule so as to include property other than that specifically mentioned in Section 803 of the code, the Convention of Judges, held in 1895, exceeded its authority, and the appellate division reversed an order granting plaintiff's motion for a discovery and inspection of parts of a locomotive boiler, through defects in which he claimed to have been injured.

The rule of the Auerbach case was followed in the case of Pina Maya-Sisal Co. *vs.* Squire Mfg. Co. (55 Misc. 325 [Supreme Court, Erie County, 1907]).

[10] 2 R. S. 199, section 21, consolidated with Co. Proc., section 388.
[11] *Id.*, section 22, amendment. See rules 14-16.
[12] Formerly rule 14, 1858; rule 18, 1871; rule 18, 1874; rule 14, 1877; rule 14, 1880; rule 14, 1884; rule 14, 1888; rule 14, 1896.

But it was not until the year 1909 (Chapter 173 of the session laws of that year) that Section 803 of the code was amended so as to read: "Book, document or other paper, *or to make discovery of any article or property.*"

By Chapter 86 of the laws of 1913, Section 803 was again amended so as to read: "Permission to take a copy *or photograph* of a book, document or other paper."

The legislators doubtless feared that the right conferred upon the Convention of Justices, to provide in the general rules of practice for the taking of a *copy* of a book was not broad enough to authorize them to provide for the taking of a *photograph! It took eight years to secure the legislative modification.*

Illustration No. 2.

On June 1, 1906, the justices of the city court of the City of New York, in convention assembled, passed a rule ordering the clerk to make up a new calendar of trial issues for October, 1906. The rule further provided that no action then regularly on the calendar should be placed upon the new calendar unless a new note of issue, for which no fee was to be charged, should be filed with the clerk between certain dates.

In the case of Willer *vs.* Mink Restaurant Co. (60 Misc. 358 [City Court Special Term, 1908]), it was held that the city court of the City of New York had no power to make such rule as it was in contravention of Section 977 of the code of civil procedure, which then provided and still provides that:

". . . . in the county of New York . . . . where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is disposed of."

The Mink case followed the rule of the appellate term laid down in the case of Rauchberger *vs.* Interurban Street R. Co. (52 Misc. 518), in which the same rule was under consideration, and in which the same conclusion is reached.

Here we have the ridiculous situation of a court being unable to clear its calendar of dead wood, because its rule technically contravenes a section of the code of civil procedure, which certainly had not been intended to achieve any such result.

To what extent will the relegation to the courts of this power of procedural regulation remedy these conditions? This brings us to Part III of our report.

Part III.—Rules of Court.

We come now to the discussion of rules of court, with two general propositions assumed to be accepted:

(a) That a judiciary article has been written into the constitution of the particular state, unifying the courts, and giving the unified court power to make its rules and discipline the members of the Bench and Bar, and that such court is constituted with an administrative body within its membership calculated to an efficient disposition of court business, and that procedural details will be eliminated from the court's consideration by the creation of masters, and that elaborate codes of procedure have been abolished.

(b) We assume that in the transition stage of such reform a Practice Act is necessary, but that it must be concise instead of diffuse, and that it must be generic rather than specific.

This brings us to:

(c) That there should be a free hand given to the courts to regulate the conduct of causes on trial or an appeal, elastic, readily amendable, including rules of evidence (if the legislature does not act in specific instances), and upon the formulation and setting in operation of such rules, that it becomes a cardinal principle that technical violation of the rules may be in proper cases disregarded by the trial court, and, unless substantial rights are thereby affected, shall be disregarded on appeal.

Under this discussion of rules we collate for the information of the club certain authoritative statements from the various discussions of this subject in recent years:

1.

"It is no longer necessary to rely solely upon a *priori* argument in support of the plan to commit control of procedure to rules of court. This mode of dealing with procedural problems now has behind it wide and long-continued experience, at home and abroad.

"(1) It has been in force in England since 1875, and now obtains also in Ireland, Canada, Australia and India.

"(2) It has been in force with respect to practice in equity in the federal courts since 1842.

"(3) It has been in force in the admiralty jurisdiction of the federal courts since 1842.

"(4) The Supreme Court of the United States has had and exercised the power to regulate the details of procedure in bankruptcy by rules since 1898.

"(5) The same court was given power to regulate practice in copyright causes by rules in the Copyright Act of 1909.

"(6) The federal commerce court had and exercised the same power.

"(7) It has been in force in New Jersey since 1912.

"(8) It is now in force in Colorado.

"(9) It has been in force within fairly wide limits in the Municipal Court of Chicago for seven years.

"(10) It is also in force, within certain limits, in the Municipal Court of Cleveland.

"(11) It has been in force for some time in modern administrative tribunals, such as public service commissions, industrial commissions and the new Federal Trade Commission.[13]"

To this may now be added the rules promulgated, and thus still under advisement, by the Supreme Court of the United States.

2.

"The power to regulate practice and procedure is properly a judicial power, and the rules should be subject to promulgation and change as the exigencies of the administration of justice may require. *Before the adoption of statutory codes of civil procedure the recognized method of regulating practice was through general rules of court.* Since the adoption of codes, however, the courts, though probably still competent to exercise their judicial prerogative, have in general acquiesced in, if they have not felt themselves controlled by, the legislative procedural enactments."[14]

3.

"What is needed in a practical matter of this sort is the possibility of *making changes when they are needed,* to have the new rule made by the people who have to apply and interpret it, to have it made with reference to concrete cases, and to have pleading

[13] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court" by Professor Roscoe Pound, 10 *Illinois Law Review*, 163 (October, 1915).

[14] Extract from report of special section of the California Bar Association, appointed to investigate and report upon the advisability of having matters of procedure and practice governed by rules of court rather than by legislative enactment, submitted to the California Bar Association in July, 1916.

and practice develop from experience, just exactly as three-quarters of our ordinary substantive law does. If we had the flexibility and power of growth in procedure that we have in our substantive law, I venture to say we should have had very little difficulty with practice in this country." [15]

4.

RULES OF PROCEDURE SHOULD BE LEFT TO THE COURTS.

"Again, as already foreshadowed above, the chief value of the reform proposed is that it substitutes for the inelastic legislative code now in operation, a project for rules, elastic and adaptable by the courts to changing conditions. If the reason for a change is valid in any degree, then the *reform should be given its full opportunity of operation, committing the entire matter of the formulation of the rules to the court at the outset.*" [16]

5.

"The rules of court are subject to being abandoned as well as adopted at the will of the court. If a rule is not a good one, it is abandoned; we can get rid of it just as quick as we got it. All we have to do is to call a meeting and pass a new rule or abolish the old one.

"We work in connection with the bar association in drafting rules. Any lawyer in Chicago is entirely at liberty to come, and we are glad to have him come in and ask for an improvement in the administration of justice. If any lawyer in that city can suggest an improved rule, the judges take the matter up with the committee of the bar association, and finally the whole court considers it, and if it seems to the judges to be a good rule, it will be adopted and put into force at once. *We don't go to the legislature, and wait from two or four or six years to get something done.* You know, in this day of specialized business, with efficiency everywhere, we haven't the time to do that. We have to reform our courts and put into them the same aggresive spirit as we do into our other organizations." [17]

[15] **Extract from address of Professor Roscoe Pound delivered before the Ohio State Bar Association in 1915.**

[16] **Extract from Memorandum on the Report of the Board of Statutory Consolidation on the Simplification of Civil Procedure in the State of New York, submitted by the Lawyers' Group for the Study of Professional Problems.**

[17] **Extracts from address by Chief Justice Olson, delivered in San Francisco in May, 1916, concerning the work of the Chicago Municipal Court.**

6.

"Furthermore, the existence of this great variety of minute, detailed statutory provisions has been breeding a great number of code lawyers, and by that I mean lawyers whose principal concern is with the statutory code of rules and not with getting justice for their clients." [18]

7.

"So far as the object of rules is to provide for orderly dispatch of business, with consequent saving of public time and maintenance of the dignity of tribunals, we ought to leave it to the tribunals, not to the parties, to vindicate them; and decisions with respect to such rules should be reviewed only for abuse of discretion. This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time, and not in the interest of the parties. But there are other rules resting upon the same basis, which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In all such cases how far the rule should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there must be an absolute rule or no rule in these cases also as if substantive rights depended upon them." [19]

8.

"(1) No one can anticipate in advance the exact workings of a detailed rule of practice. Change and adaptation to the exigencies of judicial administration are inevitable. The judges are best qualified to determine what experience requires and how the rule is actually working.

"(2) The opinion of the Bar as to the working of a rule may be made known to and made to affect the action of the judges in

[18] *New York World*, August 20, 1915. Remarks of Hon. Elihu Root in a speech before the Constitutional Convention of New York.

[19] Extract from article entitled "Some Principles of Procedural Reform" by Professor Roscoe Pound, 4 *Illinois Law Journal*, 388 (January, 1910).

framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to.

"(3) Small details do not interest the legislature, and it is almost impossible to correct them.

"(4) Too often details in which some one member of the legislature has a personal interest are dealt with by legislation, and not always in accord with the real advantages of procedure.

"(5) As experience shows that changes are needed and what they are, there ought to be a possibility of speedy adjustment of details of procedure. Only rules of court can meet this demand."[9]

This presents a most authoritative consensus of opinion in favor of this topic of our report.

There is a cautionary word, however, to be said. It is not unlikely that the preparation of the rules will always be affected by local, or, rather, personal, considerations. There is danger that it may be affected by the bias, due to education or professional experience, of the individuals engaged in drafting them. This is peculiarly illustrated in the discussion in the following two extracts by one of the most helpful contributors to the discussion of this subject, Professor Roscoe Pound.

In discussing the "Field Code" of 1848, Professor Pound remarks:

9.

"Field was not an equity lawyer and, thinking only of the legal situation, drafted some important sections in such a way as seriously to embarrass proceedings in equity. This was true particularly of the provisions as to joinder and as to cross demands, which took no account of the equitable doctrine of complete disposition of the cause and the practice of joining all persons interested in the subject of a suit in equity and proper to complete relief. Speaking of one of the provisions as to joinder, the Court of Appeals said in a well-known case:[10]

"'This provision, as it now stands, was introduced in the amendment of 1852 because the successive codes of 1848, 1849 and 1851 . . . . had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit, indispensable to its exercise.'

[9] Summary of advantages made by Professor Roscoe Pound and used by him in many articles and papers, among other places, in the article in the No. 4 *Illinois Law Review*, 388, entitled "Some Principles of Procedural Reform."

[10] *New York, & N. H. R. Co. vs. Schuyler*, 17 *N. Y.*, 592, 604.

"Under a system of regulating procedure by statutory enactment of details, the judges were powerless in such a case. They could do no more than interpret and apply; they could not alter the rules, which, unintended by their author, operated in the daily work of the courts to defeat the substantive right of parties in complicated causes. Only the legislature could apply the remedy to this condition. But the legislative amendment itself was in like manner rigid and unalterable. When it came, it did no more than mitigate the difficulty, since those who drew it had, as we are told, as best only 'some remote knowledge' of the equity practice. In consequence the amendment and legislation founded upon it in other states has been a source of difficulty and a breeder of litigation for two generations.

"A like mistake was made in the first rules under the Judicature Act in England. Those rules were drawn by men familiar with the practice in equity, with too exclusive attention to the exigencies of equity procedure, and in consequence proved a source of delay, expense and embarrassment in some classes of actions at law. But under the system provided by the Judicature Act the necessary changes came naturally and gradually. *It was not necessary to go to Parliament for new legislation to remedy each defect as it developed.* As experience showed what the difficulties were and how they might be met, the judges themselves were able to and did change the rules until, partly by revision as a whole at various times and partly by amendment of individual rules, they came into their present form. Thus at a time when the reformed procedure in America was struggling beneath an accumulated load of interpretation, amendment and controversy, which largely impaired its usefulness, the reformed procedure in England was undergoing a relatively rapid process of simplification and improvement.

"An example of the manner in which power to regulate procedure by rules of court enables speedy correction of defects revealed in the course of judicial experience may be seen in the English rules of the Supreme Court, Order 65, Rule 6A. As the practice stood prior to December, 1885, where a non-resident plaintiff was temporarily in England, security for costs could not be required of him. In December, 1884, a case was before the Court of Appeal in which the court was compelled to enforce the then practice. But it did so reluctantly and two lords justices pronounced the rule unjust. No application to Parliament for a legislative change of the law was required. In 1885 the judges adopted a new rule (Order 65, Rule 6A) providing that 'a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.' One needs only to reflect how slowly such a change would come about in an American Code of Civil

Procedure to perceive the expediency of judicial rather than legislative formulation of procedural rules." [22]

Again, after referring to the field code and how it grew from 391 to over 3000 sections, Dr. Pound continued:

"Compare with this the method employed in the English Judicature Act. That act contained about 100 sections, with a schedule of 58 rules of practice appended, leaving details to rules of court to be framed by the judges. In drawing up the first rules a mistake was made analogous to that made by the framers of the New York code. The latter had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings. Those who drew the Judicature Act and the first rules thereunder were equity lawyers, had their eyes too much on equity, and hence at first proceedings at law were made cumbersome and dilatory. An amusing exposition of the workings of the older rules may be seen in Judge Harris's book, *Farmer Bumpkin's Lawsuit.* But legislation was not necessary to effect a change. The judges themselves were able to and did change the rules as experience of actual application dictated, until the present rules were developed. How unfortunate the results of hard and fast legislation as to the details of procedure may prove in practice is demonstrated by later English legislation with respect to workmen's compensation. Instead of leaving the details of procedure in such cases to general rules to be framed by those who were to administer them, Parliament enacted where appeals should go and in what manner, in such a way that in the reports styled *workmen's compensation cases,* we meet frequent examples of appeals dismissed because taken to a divisional court instead of to the Court of Appeal or *vice versa*—about the only vestige of appellate procedure left in England." [23]

This emphasizes the importance, above asserted, of having a provision in the constitution for authority for the courts to make rules, and some provision in the constitution or the statute for membership in the Rules Drafting Committee of members of the Bar so that between the members of the judiciary and of the Bar all shades of practice may be represented and the particular situation properly covered.

[22] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court," by Professor Roscoe Pound, 10 *Illinois Law Review* 163 (*October*, 1915).

[23] Extract from article entitled "Some Principles of Procedural Reform," by Professor Roscoe Pound, 4 *Illinois Law Journal*, 388 (*January*, 1910).

A subcommittee of your committee has prepared the following schedule of topics which ought to be covered by the rules of court as distinct from being covered by a Short Practice Act.

ACTIONS AND THEIR COMMENCEMENT.

Parties—plaintiff and defendant.
- Poor person.
- Domestic and foreign corporations.
- Guardian *ad litem*—security.

Representative capacity.
- Executor.
- Committee.
- Trustee.

Appearance.

Pleading.
- Complaint.
- Answer.
- Counterclaim.
- Set off.
- Reply.
- Rejoinder.
- Interpleader.

Evidence.

The rules of evidence should be broad general rules to be included in the rules of court.

It is the opinion of your committee that rules of evidence should not be placed in the consolidated laws nor in a statutory code of evidence. As stated in the report of the Board of Statutory Consolidation dated December 1, 1912: "These rules are largely under the control of the courts and the adoption of a liberal policy in disregarding errors on appeal not affecting substantial rights would discourage much of the technical practice now so common in relation to the admission and exclusion of evidence upon the trial of causes."

The salient feature of the code of evidence presented to the legislature in 1889 by Mr. David Dudley Field and Mr. William Rumsey are available as precedents out of which a few broad general rules may be formulated which would be sufficiently elastic in their nature to afford substantial justice.

- Commissions to take testimony.
- Physical examination.

Notice of trial.
- Preference.
- Calendar practice and classification.

Trial by jury.
- Challenges.
- Method of swearing witness.
- Nonsuit.
- Verdict.
- Disagreement.
- Waiver of jury.

Trial by referee.
- Reference by consent.

In the opinion of your committee where both sides agree upon a referee, the same must be appointed by the court except in matrimonial actions.

Judgment.
- By default or confession.
- Summary.
- After trial or reference—after appeal.
- Taxation and retaxation of costs.
- Entry of.
- Judgment roll.
- Lien of.
- Stay of.
- Setting aside.

In the opinion of your committee, the reinstatement of verdict reversed on intermediate appeal, should be provided for by rule.

Appeal.
- Notice of.
- Security.
- Stay on.
- Record on and filing.

In the opinion of your committee, the original stenographer's minutes only should be before the court obviating the expense of printing the same.

- Notice of argument.
- Preference.
- Briefs.
- Hearing.
- Decision.
- *Remittitur.*

Execution.
- Discovery in aid of and proceedings supplementary to execution.

In the opinion of your committee, arrest and body execution should be limited to wages.

General provisions.
- Forms of process, summons, supœna.
  - pleadings
  - affidavit
  - order
  - notice of claim
  - *lis pendens*

Papers.
- Service and filing.

Summons and motion for directions.
- Amendment.
- Pleading new cause of action by amendment, on terms.
- Consolidation and severance.
- Extension.
- Stay.
- Want of prosecution.
- Default.
- Argument.

Payment into court and out of court.
- Gross sum, in lieu of annual interest.
- Regulations for court deposits held by banking institutions.

Detention, inspection, preservation and survey of property.

Arbitration of controversy.

Judgment creditors' actions.

Part IV.—Conclusion.

The generic purpose of the Phi Delta Phi Club, consisting as it does of graduates in New York and vicinity of the legal fraternity of Phi Delta Phi in the law schools of the country, *is to promote the acceptance and the realization of high ethical ideals.* In reports to the New York State Bar Association and to the American Bar Association at their meetings in 1917, the Committees on Professional Ethics emphasize the fact that the mere adoption of canons of professional ethics was a mere *brutum fulmen,* unless the profession is to carry the spirit of such canons into each professional relationship; that is to say, there must be an *applied* ethic; and the lawyer in his relation to the community must be a student of what Professor Ormond, of Princeton, used

to characterize as the "*metaphysics of oughtness.*" He must be sensitive as a barometer to the evolutionary movements in the community life around him. He must never permit any idea of his personal convenience or profit to influence him in obstructing requisite reforms. Because he may have learned to practice under one scheme of procedure he must not be unwilling to adjust himself to the demands of the new generation for a more expeditious and efficient judicial administration. The days of the retainer and refresher may come again, and the contingent fee and the negligence specialist may largely disappear, but it is clearly to the interest of the legal profession in the last analysis to minimize the time between the summons and the judgment; between the assertion of the claim and the collection of the award. Modern conditions call for speeding up the machine and modern professional ethics make it, in the language of Hoffman's tenth resolution, "essential that should clients be disposed to insist upon captious requisitions or frivolous or vexatious defences, they shall neither be enforced nor countenanced" by the high-minded practitioner.

Professor Ormond, above mentioned, Princeton, '79, and later a valued professor of philosophy in that institution, was summarizing in 1885 the philosophy of Herbert Spencer to a junior class and he said, "It is an attempt to weld together a sensational psychology and a transcendental ontology and to subsume it all under the concept of evolution."

It will not be a violent effort for the intelligent reader to apply this characterization to the relationship of the profession of the law to procedural reform.

If, as we said at the outset of this report, the administration of justice is the highest concern of man on earth, Burke was right, when he uttered that phrase, in assuming the transcendental nature of the professional career, at the Bar or on the Bench.

But it is obvious that while the task of accomplishing this great scheme of simplification is the primary duty of the lawyers of the land, it is equally obvious that numerically there will be a majority of the Bar of any given period in opposition to that just ideal, and it is therefore the duty of those who are pledged to the ideal to gain support if possible from the general public in order to the accomplishment of the fundamental and structural changes in the constitution and statutes of any state that are required to effectuate that ideal.

The word "ideal" is used with regard to reform subjects in two senses. By the "reformer" (a hackneyed term and with a content almost of reproach) it is used to designate the ultimate, desired goal in the evolution of some social condition. By the practical man who has not been able to study the matter in all its phases and connections the word "ideal" is used to indicate the impossible, the unachievable; and the reason why reforms progress so slowly is that the average legislator and the average voter look upon the "reformer" as a man without practical ideas and upon his ideals as utopian and unworkable. It took a generation to fasten a code of civil procedure on the practice in the State of New York. It has taken another to realize the cruel grip it has on the welfare of the community. It may take another to fully cure the evils which it has wrought.

Your committee has had in mind, therefore, the fact that a constitutional change depends for its accomplishment upon the vote of the general electorate of the state, and it realizes that the general electorate of the state does not always vote upon a constitutional amendment in the same numbers and with the same interest with which they vote for a particular individual as a candidate for an official carrying a salary.

It is hard to get the voters of the state to attend public meetings at which dry, legal, procedural reforms would be presented for discussion. Yet if they can be aroused and made to realize that their pockets will be profited and their property rights better safeguarded, their litigation expedited, their disputes more effectually and reasonably adjusted, a constitutional reform, even to the extent suggested in the draft judiciary article in Part I of this report, can be effected, or in the language of the man in the street, it "can be put across."

In the second place, a legislature is hard to deal with in the matter of procedural reform. The man who has made the profession of law a career and is unwilling to turn aside to the right hand or to the left, rarely runs for the state legislature. There are from time to time great lawyers in local legislatures, and the record of our public life is full of the public service rendered in Congress and in state legislatures by distinguished lawyers. And the legislature of the State of New York has given, by able men, the most careful study and unselfish and untiring labor to this

general subject, as evidenced by the enormous record of the work of the Rodenbeck Board, and of Senator Walters' Joint Legislative Committee, and the Bar of the state is under a great debt of gratitude to these men. But it must be remembered that these men are *doing this on the side,* and that it is not their chief and main duty or purpose. They have countless other claims upon their time and attention, and it is a marvel that their work is so little open to criticism in view of all these conditions. The four blue volumes which the board published in 1915 do not begin to represent the total labor of this board and of the Joint Legislative Committee that has been dealing with its work.

We are reminded by the nature of the labors of the latter committee of the experience of Theophilus Thistle, the successful thistle-sifter, who in "sifting a sieveful of unsifted thistles, sifted 3000 thistles through the thick of his thumb." The writer of this report was privileged by the Hon. J. Henry Walters, chairman of that legislative committee, to examine the details of the work which they had so carefully done. They had taken the more than 3000 thistles of code sections and sifted them, sentence by sentence. Each section was pasted upon a separate manila sheet about two feet square, each sentence in each section was sifted separately and a note made of whether as an adjectival provision it was covered by some general provision of the Short Practice Act, or relegated to the general domain to be covered by rules of court, or, if it was a provision of substantive law, then note was made of the fact that it was preserved and relegated to one of the consolidated laws, *e. g.,* real property law, domestic relations law, public officers law, judiciary law, personal property law, etc., or whether it would be repealed. It is obvious that such a task was colossal, and the report of the committee made to the legislature of the state on April 23, 1917, must receive very careful study.

We gather from the report as a whole that the committee does not give unqualified support to the report of the Board of Statutory Consolidation and that it has acquired additional material on the basis of which it, or a similar committee or agency, may be authorized to "prepare and submit a plan of simplification and proposed legislative bills therefor." But we remain unalterably of the opinion that constitutional amendments must accompany such a plan.

We proffer the judiciary article in Part I with due acknowledgment to the group for the study of professional problems and to the original Committee of Seven of this club, as a starting point, for such a change.

We commend the Short Practice Act of the committee on the Supreme Court of the New York County Lawyers' Association if boiled down into more generic conciseness, as a starting point for a legislative enactment.[24]

But in regard to the rules of court we believe that there must be a transition period during which, after the unification of the court and the operation of the Short Practice Act the existing rules, so far as not inconsistent with the change, shall continue in operation until the committee appointed by the Board of Organization and Control, including members of the Bar, may have formulated appropriate rules.

If the regulation is to be left to the court, the court and not the legislature should create the rules. The experiment by the Supreme Court of the United States on both sides of the practice of the federal courts has been a great success. The work of the American Judicature Society, which is forthcoming, will be a most material aid. The American Bar Association conference of bar associations, convened by it, and the efforts of its Committee on Unification of State Laws, will all contribute to simplify the task of drafting and promulgating rules.

We submit the foregoing suggestions for the consideration of the general public as well as of our brethren of the Bar, believing that, if public sentiment in favor of such reform and simplification develops, the enlightened opinion of the associations of the Bar of the country, of the states and of the counties of the states, will combine to exert such pressure upon the legislatures that they will be willing to propound amended judiciary articles to the electorate and themselves enact such legislation as will carry the reform into operation. The maxims "*bis dat qui cito dat,*" and "If 'twere well 'twere done 'twere well 'twere done quickly," do not necessarily apply. Rather, we would say, "If 'twere well 'twere done, 'twere well 'twere well done."

[24] See copy thereof, reprinted in the Annals of the American Academy of Political and Social Science, September, 1917.

V.

CONTRIBUTIONS OF COMPARATIVE LAW BUREAU.

CONFISCATION OF PRIVATE PROPERTY OF FOREIGNERS UNDER COLOR OF A CHANGED CONSTITUTION.

Before Venustiano Carranza shall be enshrined in the hearts of the American Bar as the George Washington of Mexico, where Mr. Joseph Wheless (in the JOURNAL for October) attempts to put him, some further facts should be stated.

Mr. Wheless disarms criticism by admitting and condemning Carranza's pro-German plots against his next-door neighbor to the north who is now protecting his tottering régime by an embargo against arms, an embargo enforced by a patrol which is said to cost the United States $50,000,000 per annum.

It is difficult to over-state the condemnation due to one who champions the cause of the Hun, but when such a champion poses as a reformer and a friend of liberty and an agent of moral uplift, the mind turns instinctively to Russia and Wilhelm's congenial (and murderous) allies, Lenine and Trotzky, those lovers of made-in-Germany peace and haters of "the allies and the United States."

Mr. Wheless in his effort to prove the Mexican Revolution as an act of redemption of the people and as a triumph of justice, relies principally upon the self-serving declarations of the revolutionary literature. His fulsome eulogy of Carranza over-shoots the mark. Was the Carranza revolution a revolution *of the people?* In all public revolutions, there has co-existed with the dictator, a "convention," a "committee of public safety," a "Jacobin club," a "committee of laborers and soldiers," or the like. Here, we have merely a "first chief" invested, according to Mr. Wheless, "with a greater panoply of plenary powers than had ever been assumed by any self-imposed dictator in Mexican history. Peter the Great revolutionized the barbaric Russian Empire and directed it toward occidental civilization. He was a "first chief" and his work was eminently revolutionary, but this period in Russian history could scarcely be called "an epoch of *public* revolution." Carranza in like manner has made a personal revolution in Peter the Great's style.

The zeal of Carranza in making obligatory primary instruction is praised by Mr. Wheless, who, however, overlooks the fact that laws to the same purpose have existed in Mexico for many years. Moreover the Carranzista decrees have not been carried into effect and thousands of teachers have been obliged either to leave the country or to earn their living in other ways.

The speeches of Robispierre are hypocritical discourses on the triumph of justice and the reign of virtue. In admiring Carranza's words condemning the works of injustice, Mr. Wheless does not mention that the corruption of the Carranzista system had reached the point where in November, 1918, the procurator of justice, yielding to the public demand, asked that a special system of espionage be established, because of the charges of venality that an irate public had made against the magistrates, judges and employees of the judiciary branch.

Mr. Wheless applauds Carranza for forbidding that men in military service be elected to public positions. The present governors by "election" in Sonora, Durango, Jalisco, Veracruz, Campeche and other states, were and are military men in command of troops in the states which they govern.

Homage is paid to Carranza's democratic spirit in having surrendered to Congress "his plenary powers of dictatorship," but within a few days of the convening of Congress, May 8, 1917, Carranza obtained the passage of the law investing the Executive with *all the faculties of Congress in the Treasury Department;* with which authority Carranza personally has, with absolute freedom, created all kinds of contributions and taxes, issued new customs tariffs, altered the monetary system, and declared that petroleum beds, in which hundreds of millions of dollars of foreign capital have been invested, are the property of the nation.

A comparison of the Mexican Constitution of 1857 with the constitution of Carranza of 1917, will show how the despotism of the executive power has been exalted at the cost of the powers of Congress. The tendency of *public* revolutions, when their activities form a constitution, is to broaden the faculties of the legislative power and to restrict those of the executive. This result was to be expected especially in Mexico, where the presidents have always been accused of oppressing the liberties of the peoples. Logically, the constitution of 1917 should have limited rather

than extended the powers of the president. While the Carranzista constitution contains numerous precepts of the most radical socialism, is inspired by a spirit of hostility toward foreigners, and contemplates a system of property which denies all principles of justice, it has at the same time established an executive invulnerable and all-powerful whose incumbency is free from impeachment even for violating the constitution.

Performance, not promise or profession, must form the basis of judgment, and Carranza's much-advertised theatrical reforms will be found to be mere paper decrees, high-sounding, ineffective and valueless in the face of the actual facts and conditions. Where are almost all of the best men and women of Mexico? Murdered or in fear of murder, living in exile, their property confiscated, or in ruins. Where are the industries of Mexico? Paralyzed and helpless under an avowed policy of hostility to all foreigners (in practice, all except Germans)—a policy of insular hate and narrow jealousy which puts the Carranza government beyond the pale as an impossible partner in the league of nations. Where are the principal foreign-owned banks, railroads, express companies, steamship lines, telephone systems and other utilities? In Carranza's hands, seized and guarded and the revenues taken by the "government" without a peso of compensation, or a centavo of interest or return to the foreign bondholders or stockholders. Everything loose and available has been confiscated—taken without a pretence of payment. And the petroleum industry, groaning under the burdens of almost unbearable taxes, is subject to the open threat, the avowed purpose of *confiscation by a new constitution.*

Carranza's attitude toward the Americans who discovered and developed the petroleum of Mexico, may be taken as typical of his hatred of foreigners and his standards of morality.

Prior to the Querétaro constitution of 1917 (when only a small portion of Mexico was in the control of Carranza, so that the so-called constitution represents the will of the then dictator), scores of millions of money from the United States, Great Britain and elsewhere had been invested in the exploitation and development of Mexican petroleum on the faith of the then existing laws which recognized the owner of the soil as having the right to deal

with the petroleum in his land as a part of his own property. The mining law of Mexico of 1884 provides as follows:

"ART. 10. *The following substances are the exclusive property of the owner of the land,* who may, therefore, develop and enjoy them without the formality of denouncement or special adjudication:

"I. Ore bodies of the several varieties of coal.

"II. The rocks on the land and substances of the soil such as limestone, slate, porphyry, basalt, building stone, soils, sands, and all other analogous substances.

"III. Substances not specified in Section II, Article 1, to be found in placers, such as iron, tin, and all loose surface minerals.

"IV. Salts found on the surface, fresh and salt water, whether surface or subterranean; *petroleum* and gaseous springs, or springs of war or medicinal waters."

Geological surveys were made, leases were executed, lands were purchased, machinery was taken in, exploratory drilling was done and the petroleum which had lain untouched for centuries was made available by the enterprise in large part of Americans and American capital for use in the advancement of civilization. In the case in which property was purchased in fee, the owner was permitted without let or hindrance to expend his money thereon in the effort to locate and produce oil. Where leasehold interests were taken, such rights were embodied in public documents requiring the assent of the authorities and evidenced by notarial acts bearing the requisite stamp taxation and duly registered. There was no word from any governmental source except of encouragement of an industry, the development of which meant prosperity for Mexico, and an increase of the welfare of the entire world by making available an almost inexhaustible supply of cheap fuel. Millions were spent in drilling and in the construction of pipe lines and storage terminals and more millions were invested in tank steamers for the carrying trade.

In the Academy of Jurisprudence in Mexico in the year 1905 there was moved a resolution justifying the proposed naturalization of petroleum. Each member of that distinguished body, comprising all the leading lawyers of Mexico, took part in the discussion; several learned papers were prepared and read; the whole proceeding has been duly recorded and published. Save for the mover of the resolution, the vote was unanimous against the proposal as an unthinkable interference with vested rights of property.

The early American seekers for petroleum in Mexico were pioneers in the true sense of the word, undergoing danger, hardship and the risk of great loss in answer to the splendid challenge of high adventure. Scores gave their lives in the work. They played the game for themselves, but in winning they won for humanity and the advancement of civilization. The problem of the future is the problem of transportation, and its key is fuel.

These pioneers braved and achieved as they did in the belief that they would be protected by the law in that which they honestly acquired and in the belief that, as American citizens, international law would not permit their lawfully acquired properties to be confiscated.

Yet this is what has been attempted by the so-called constitution of Mexico of 1917. Article 27 of that document provides as follows:

"In the nation is vested direct ownership of all . . . . petroleum and all hydrocarbons—solid, liquid or gasous."

And this in the teeth of the assurance contained in Article 14 of the same paper:

"No law shall be given retroactive effect to the prejudice of any person whatsoever.

"No person shall be deprived of life, liberty, property, possessions or rights without due process of law instituted before a duly created court, in which the essential elements of procedure are observed and in accordance with previously existing laws."

Article 27 is not self-executing. When the first Congress assembled there were ominous rumors of a petroleum law that would embody the confiscatory provisions of the constitution. But no such law was passed and the Congress adjourned, having merely authorized the executive to make decrees regarding the Department of Hacienda (Treasury).

The executive, although vested with no authority except in fiscal matters, proceeded to promulgate petroleum decrees attempting to put into effect the confiscatory provisions of Article 27 of the constitution.

By the Carranza decree of February 19, 1918, it was provided that all petroleum properties must be made the subject of *manifestations* which must be filed on or before July 15, 1918. By the filing of such *manifestations,* the owner of the property

became entitled to a preferential right to *denounce* the properties. By such denouncement, the denouncer would secure a right similar to that obtained under the mining laws in respect to precious metals. Failure to file the manifestations renders the property subject to denouncement by the first comer. If the owner fails to manifest or having manifested, fails to denounce, his property is lost according to the terms of the decree. Any one may take it from him as if it were ordinary mining property. On the other hand, if the manifestations were filed the owner's prior right was gone, he was in under the scheme, and all he could do would be to file a denouncement, whereupon he exchanged for his former right of ownership a mere mining right which could be legislated out of existence or rendered valuless by state action. And foreign corporations were not even given the right to "denounce" their own properties.

The crisis which existed was not merely a crisis in the lives and fortunes of those in the petroleum industry. It had relation, because of the essential part played by Mexican petroleum as fuel for the Allied battleships, to the welfare of this nation and of the world.

The State Department of the United States, acting through Minister Fletcher, presented to the Mexican Government a solemn protest under date of April 6, 1918, the text of which was not published, however, until June 29, after the Mexican Government had published it in the effort to show insincerity in President Wilson's talk to the Mexican editors. That note, among other things, stated:

"It is, however, to the principle involved in the apparent attempted separation of surface and subsurface rights in its decree that my government desires to direct special attention. It would appear that the decree in question is an effort to put into effect, as to petroleum lands, Article 27 of the constitution of 1917, by severing at one stroke the ownership of the petroleum deposits from the ownership of the surface. . . . .

"It becomes the function of the government of the United States most earnestly and respectfully to call the attention of the Mexican Government to the necessity which may arise to impel it to protect the property of the citizens in Mexico divested of or injuriously affected by the decree above cited. The investments of American citizens in the oil properties in Mexico have been made upon the reliance in the good faith and justice of the Mexi-

can Government and Mexican laws, and my government cannot believe that the government of a neighboring republic . . . . will disregard its clear and just obligation toward them."

The Fletcher note termed itself "*this firm and solemn protest of the government of the United States against the violation or infringement of legitimately acquired American private property rights.*"

The time for filing manifestations was extended until August 15, 1918. Prior to this time, unless the decree was revoked, a most momentous and far-reaching decision was required of the petroleum industry. If they filed manifestations, their property rights were gone, and they were subject to any whim or caprice of any one temporarily in power in Mexico; if they did not file, their properties under the decree were open to denouncement as if they had no rights to them.

There was another and even more serious factor. If by filing manifestations, the constitution and decree declaring that petroleum belonged to the nation were acquiesced in, the international aspect became most alarming. Under international law, neutral nations may not themselves furnish the materials of war to belligerents. Fuel oil from Mexico petroleum was essential to the supply of the Allied navies battling with the hideous submarine menace. If the petroleum men, following lines of least resistance, gave in to the Carranza administration, a large number of Germans in Mexico would be quick to seize the point that *neutral Mexico might not furnish its own fuel oil for our navies.* If the petroleum interests, under the duress of the decree and the threats of denouncement, should bow the knee to the Carranza administration, the Allied governments might be seriously handicapped. For no matter how disastrous the consequences, it is difficult to conceive of the United States using force against Mexico when Mexico occupied a position unimpeachable under international law.

In this trying emergency, the pioneers of the petroleum industry proved themselves patriots and Americans. With entire unanimity they decided to stand for the right. They refused to file manifestations. As international law requires that local remedies must be exhausted, preparations were made to apply to the Mexican courts for "amparo."

In this tense and breathless situation, on August 14, 1918, word came that the prior decree had been modified and that the Carranza government had informally published a decree said to be dated August 12, relieving the necessity for filing manifestations. The substance of this decree was telegraphed north by the representatives of the various petroleum companies who were obliged before August 15, 1918, to arrive at a decision as to its effect on the prior decrees in respect of filing manifestations.

The decree did contain a measure of temporary relief in respect of filing manifestations. The Carranza government had not receded from its confiscatory attitude, however, but still insisted on the enforcement of Article 27 of the constitution and the separation of surface rights and petroleum rights. In brief, the decree of August 12 provided:

(a) That no manifestations need be filed in the case of developed oil properties. This, apparently, left unprotected and still subject to the prior decrees all oil properties on which actual work had not been commenced, although many of these properties had been secured at large prices for the purpose of development.

(b) Producers must pay to the government a *rental* of five pesos per hectare, and in addition a *royalty* or share of the petroleum produced, in recognition of the government's ownership. Under Mexican laws, taxes may be exacted only in money. The exaction of one-fourth or one-half or any other proportion or the production of an oil well cannot be regarded as a tax.

(c) By the payment of these exactions, the owner of the oil property was given a preferential right to execute a "special contract," giving him the right to extract petroleum from his own property or by virtue of his own lease. The terms of these so-called contracts are not specified, but are to be made the subject of subsequent regulations, a matter entirely within executive control and concerning which no information can be obtained in advance.

(d) If the "taxes" are not paid, the penalty is the absolute loss of the property.

As this is written (December 20, 1918), the Mexican Congress is again in session, Carranza in his message to it having urged the adoption of a petroleum law "regulating" Article 27 of the

constitution. The full text of the bill is given in the "El Pueblo" of Mexico City, of November 24, 1918. This tedious recital need only be closed by saying that the proposed "Ley del Petroleo" is equally as objectionable as the prior illegal decrees. In all of these decrees and in the proposed law, the constitution is considered as sweeping away, at one stroke, although with no pretence of compensation, all of the rights of every nature which the petroleum concerns had acquired and paid for *pursuant to the laws of Mexico,* and the proposed law provides for an administrative forfeiture for any grave breach of the petroleum regulations. Under the present régime the Ten Commandments may not be popular in Mexico City, but the least popular of all is the Commandment "Thou shalt not steal."

And in the answer filed by the Carranza administration to the amparos against such confiscatory attempts, among other "precedents" relied on was the act of Abraham Lincoln in freeing slaves!

It is difficult to consider seriously any part of the Carranza answer to the challenge of a bald act of attempted confiscation of American, British and Dutch rights. The proposition that rights of property may be divested by a revolution and a new constitution has the sole merit of novelty. It finds no countenance in law or equity or in principles of natural justice. Even a conqueror recognizes rights of private property.

"It is very unusual even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the rights of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. . . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. . . . . The cession

of a territory by its name from one sovereign to another . . . . would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

United States *vs.* Percheman, 7 Peters 51 (1833).

The same rule applies in cases of cession. In Mitchel *vs.* United States, 9 Peters 711, at 733 (1835), the court laid it down as definitely settled and established by the United States Supreme Court

"that by the law of nations, the inhabitants, citizens or subjects, of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by orders of the conqueror, or the laws of the sovereign who acquires it by cession. . . . . That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee."

In Leitensdorfer *vs.* Webb, 20 Howard 176 (1857) the court said:

"This is the principle of the law of nations, as expounded by the highest authorities. In the case of the Fama, in the 5th of Robinson's Report, page 106, Sir William Scott declares it to be 'the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed.' So, too, it is laid down by Vattel, Book 3d, Cap. 13, Sec. 200, that 'the conqueror lays his hands on the possessions of the state, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters.'"

Chief Justice Marshall said:

"In the treaty by which Louisiana was acquired the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States as a just nation regards this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract."

United States *vs.* Soulard, 4 Peters 511 (1830).

If a change in sovereignty, either by conquest or cession, leaves rights of private property secure and unaffected as "consecrated by the law of nations" (U. S. *vs.* Moreno, 1 Wall 404), *a fortiori*

Mexico herself cannot by setting up a new government and a new constitution declare that private property of foreigners shall belong to the nation. It was the nation of Mexico before the revolution. It is the nation of Mexico after the revolution. To seriously advocate such a course seems to the candid mind merely an evidence of moral obliquity.

Within the last year or so, Mr. Samuel Gompers criticized a proposed course of action as not in accord with advanced thought and modern notions, especially as embodied in the Russian and Mexican constitutions. The extent of Mr. Carranza's "advanced thought" may be illustrated by one or two typical provisions of the constitution of 1917:

"Strikes shall be considered unlawful when the *majority of the strikers* shall resort to acts of violence against persons or property . . . ."

"Lockouts shall only be lawful when the *excess of production* shall render it necessary to shut down in order to maintain prices reasonably above the cost of production, *subject to the approval of the Board of Conciliation and Arbitration.*"

Included under Title VI, Article 123, "Of Labor and Social Welfare," we find several provisions which would delight Mr. Scott Nearing's radical soul. Space permits of the following only:

"A workman who is discharged for joining a labor union may insist upon being indemnified by the payment of three months' wages. The employed shall incur the same liability if the workman shall leave his service on account of the *lack of probity* of his employer . . . ."

The true picture of Mexico today is that of a divided country, whose various parts are under the control of military chieftains. Some of these owe a technical allegiance to Carranza. Almost all, whether Carranzista or anti-Carranzista, are exploiting natives and foreigners alike by a reign of force and terror.

Mr. Jerome K. Jerome has suggested Lenine alias Bronstein for the presidency of the New League of Nations. Cannot Mr. Wheless find someone to nominate Venustiano Carranza?

IRA JEWELL WILLIAMS.

BOOK REVIEW.

A World-Court in the Light of the United States Supreme Court. By THOMAS WILLING BALCH. (Philadelphia: Allen, Lane and Scott, 1918, pp. 165.)

This book is the result of a careful historical inquiry, and has appeared at a time when its suggestions for the future are of especial value. While only one of quite a number of monographs on this general subject, it is noteworthy for its full account and discussion of past events of pertinent significance.

Mr. Balch begins by a reference to the leading inter-colonial and inter-state disputes in this country before the adoption of our present constitution, which resulted in a settlement before chosen arbitrators, judges, or referees. Part I is devoted to this, and emphasizes the fact, brought to memory at the opening meeting of the American Society for the Judicial Settlement of International Disputes, in 1910, that the first submission in modern history of such a dispute to arbitration was made by New Netherland acting in behalf of the Netherlands, and the United Colonies of New England, as early as 1650. Governor Stuyvesant proposed it, and the Netherlands ratified the award, though England failed to do so.

The Wyoming boundary decision, rendered in 1782, under the Articles of Confederation, in favor of Pennsylvania against Connecticut is discussed at some length, and brief allusion is made (p. 29) to other proceedings in like cases, mentioned in the valuable notes in 131 U. S., Appendix, p. 1.

In Parts II and III is given a brief sketch of each of the principal suits between states which have come before the Supreme Court of the United States, beginning with New York *vs.* Connecticut, in 1799.

Then follows, in Part IV, an examination of the cases involving questions of law in which states were interested, but were not parties. Considerable space is justly accorded to the case of the sloop *Active*, a Connecticut vessel, captured by the British early in 1778, recaptured by its crew, and then seized by a man-of-war of Pennsylvania. Here, by a judgment of a Pennsylvania court, the recaptors were awarded prize money. An appeal followed to Congress, and its Standing Committee on Appeals

reversed the Pennsylvania judgment. Meanwhile the *Active* was sold and the proceeds paid into court, for the benefit of whom it might concern. Congress supported its committee. Pennsylvania ordered the fund in court to be paid into the state treasury. After the adoption of the Constitution of the United States, the original owner of the *Active* asked the United States District Court for the District of Pennsylvania for an order that the state treasurer refund the money in his hands. Pennsylvania passed a statute affirming his right to keep it, and in 1808 there was an appeal to the Supreme Court of the United States for a mandamus to compel the payment of the funds in dispute to the owner of the sloop. It resulted finally in his getting the money, but not until the state militia had been called out to defend the rights inherited from those who made the final capture, and the District Court had ordered the marshal to raise a posse to enforce the original judgment.

Part V is given up to a review of the Dred Scott case. The author regards it as proof of the inability of the Supreme Court, at that time at least, to settle any great question of economic interest in which the states divide and are found ranged in opposite camps (p. 82).

In Part VI the author forecasts the future relations between the states and the United States as affected by the Sixteenth Amendment to the Constitution of the United States. This, he thinks, "eventually will enable it to destroy all but the shell of the power of government and sovereignty possessed originally by the individual states. As a result, Pennsylvania, New York and the other individual member states of the union will then have no more sovereign power than Calvados and the other departments of France, or Somersetshire and the other shires of England, or Hesse-Nassau and the other provinces of Prussia possess today" (p. 95).

In the remaining Parts, the question of the necessary sanction in case of a judgment of a world-court against a nation is considered. Mr. Balch takes the position that the public opinion of the world will not suffice, unless its weight is essentially increased by cultivation:—a gradual process of evolution (pp. 130, 141, 155); but that the force of all the nations commissioning the court must in some way be utilized against any one of them that might refuse to abide the judgment (p. 123).

A quotation is given from an interesting communication to Mr. Balch from Professor John Bassett Moore, in which the latter expresses himself thus:

"I am inclined to think that the possibilities of force in maintaining peace are often exaggerated by the omission of one fundamental consideration; namely, that the availability of force in the long run depends on opinion or sentiment. During the past century there have been almost innumerable civil wars, one of the greatest being that which for four years swept over the United States. And yet we had a national government, and under it an administration far more centralized than any one now proposes to establish over nations. But when the sentiment of the country divided, its force likewise divided, and war naturally resulted. The fundamental problem therefore is how to preserve unity of sentiment" (p. 150).

That, if ever attained, would preclude the use of physical force to enforce a world-court judgment, and in the reception of President Wilson's 14 points there is a close approach to it.

The volume under review is calculated to encourage all who are hoping for the establishment of a world-court. It will help on the movement towards unity of international policy founded on unity of international opinion.

It is to be regretted that Mr. Balch has not always verified his citations.

In the case of Fowler *vs.* Lindsey, 3 Dallas 413 (1799), for instance, in the opinion given by Mr. Justice Washington occurs this passage:

"I will not say that a state could sue at law for such an incorporeal right as that of sovereignty and jurisdiction, but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a Court of Equity."

In the opinion in Rhode Island *vs.* Massachusetts, 12 Peters (1838), this is referred to thus:

"In 1799, it was laid down, that though a state could not sue at law for an incorporeal right, as that of sovereignty and jurisdiction; there was no reason why a remedy could not be had in equity."

This attempt at summarizing the cautiously worded sentence in the earlier case, was obviously unsuccessful, but is copied by Mr. Balch (39) without remark.

In the same case of Rhode Island *vs.* Massachusetts, 12 Peters 735, the opinion contains this passage:

"In the first aspect of the case, it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid: neither of which present a political controversy, but one of an ordinary judicial nature, of frequent occurrence in suits between individuals. This controversy, then, cannot be a political one, unless it becomes so by the effect of the settlement of the boundary; by a decree on the fact, or the agreement; or because the contest is between states as to political rights and power, unconnected with the original, or compact boundary."

Mr. Balch quotes so much of this as ends with the words, "This controversy, then, cannot be a political one," substitutes a period for the final comma, and omits all that follows.

SIMEON E. BALDWIN.

NECROLOGY.

DON MANUEL TORRES CAMPOS, a distinguished Spanish legal scholar and honorary member of the Comparative Law Bureau, died in April last. The following notice, written by Sr. Emilio Miñana and published in the Revista General de Legislación y Jurisprudencia of Madrid (Vol. 132, p. 256, March-April, 1918), has been translated by Mr. William W. Smithers, one of the managers of the bureau:

"Señor Torres Campos was born in Barcelona, May 20, 1850. Very young, when he had hardly completed his twenty-first year, he obtained by his brilliancy the degree of Doctor of Civil and Canonical Law in 1871 and the same year was elected corresponding member of the Société de Législation Comparée of Paris. From 1872 to 1880 he was librarian and member of the governing body of the Academia de Jurisprudencia y Legislación of Madrid. He was secretary of the Judicial Congress of Madrid held in 1886, member of the Commission of Foreign Legislation of the Ministry of Grace and Justice in 1885, associate of the Institute of International Law from 1885 and member of the same from 1891, lecturer on public and private international law at the University of Granada from 1886, president of the Section of Public Law of the Judicial Congress of Lisbon in 1888, in the same year being awarded a gold medal at the Universal Exposition of Barcelona, was corresponding member of the Academia Real de Ciencias of Lisbon from 1893, honorary member of the Faculty of Law and Political Science of the University of Chile from 1894, delegate from Spain at the Conference of Private International Law held at the Hague in 1893, vice-president of the Lisbon Congress of the International Union of Penal Law in 1897, member of the

Ecuador-Peru Boundary Commission of 1897-1898, member of the Hague Permanent Court of Arbitration from 1901 to 1906 and recipient of other honored distinctions, some of which, consisting of foreign decorations such as Official of the Crown of Italy (1888), Official of Public Instruction of France (1910), the Grand Cross of the Conception of Villaviciosa of Portugal (1893) could be attributed only to recognition of real merit, emanating from an endless list of burdens sufficient to fill a life of ceaseless activity for others, but not more than a feeble indication of the fecund labor to which the life of this learned professor was entirely surrendered.

"When it was mentioned in foreign reviews such as the Bulletin de la Société de Législation Comparée of Paris, that this or that work had been undertaken by Torres Campos of Spain we perceived in this indefatigable intellectual laborer one of those Spaniards who wish to rectify by their activity the legend of the lazy and backward Spaniards which many beyond the Pyrenees and even certain pseudointellectuals of the hither Pyrenean range groundlessly attribute to us.

"Apart from his industry as instructor into which he put all his affection, there are to his credit as an advanced publicist, among others, the following works: *Estudios de Bibliografía español y extranjera del Derecho y del Notariado,* rewarded with a gold medal by the ruling academy of the Notariat (Madrid, 1878); *Principios de Derecho international privado ó de Derecho extraterritorial de Europa y America en sus relaciones con el Derecho civil de España,* distinguished by being adopted by the corporation of the Bar of Madrid (1883); *Bibliografía española contemporánea del Derecho y de la Política* (1883-1908, 2 vol.); *Bases de una legislación de extraterritorialidad,* recognized by an award of 5000 pesetas by the corporation of the Bar of Madrid (1896); *Elementos de Derecho international privado* (1st ed. in 1887, 4th ed. in 1913); *Elementos de Derecho international público* (1st ed. in 1890, 3d ed. in 1912), and other works.

"The troublesome bibliographical labors, most useful for the scientific investigator, who economizes time and effort, and the precise and clear views expressed in the works on elements of international law, so different from those voluminous books which must be turned patiently page by page in order to extract an idea, will be perpetual testimonies of his scientific force and of his industry which overcame all obstacles. That activity is manifest in the pages of this review even after his death, by the appearance of his usual bibliographical contributions in the preceding and the present issue, as an offering transmitted to our readers from the region of mystery, a posterior reminder of the industry of a spirit that is no longer among us."

W. W. SMITHERS.

ROBERT J. KERR, one of the editors of the Comparative Law Bureau, died in August, 1918, and the following minute of his life and work is recorded:

"Robert Joseph Kerr was born in Chicago, on the west side, December 27, 1872. He was the son of Samuel and Josephine Marian (Kirk) Kerr. He attended the old Tilden School on West Lake Street and the West Division High School, and completed his preparatory studies at the Northwestern University Academy at Evanston. He graduated from the Liberal Arts Department of Northwestern University in 1894 with the degree of A. B. He studied law in Northwestern University and received the degree of LL. B. in 1895, and was admitted to the Bar the same year. He immediately began to practice law, becoming associated with his father's firm of Kerr & Barr. Subsequently, Mr. Kerr and his father organized a new firm composed of themselves, and styled Kerr & Kerr. In 1914, Mr. Kerr's brother, William D. Kerr, was admitted to membership in the firm. He was taken ill with typhoid fever in Mexico City in July, 1918, and died August 18 at the American Hospital in Mexico City after four weeks confinement. His body was interred in the beautiful American cemetery at Mexico City, August 19.

"Mr. Kerr specialized in American corporation law and Mexican law. Having an opportunity early in his professional career to see at first hand the resources of the Mexican Republic, he became convinced that a wonderful future lay before our neighbor to the south, which was then rapidly undergoing development by American capital. He immediately proceeded to familiarize himself with the laws, customs and manners of the Mexican people in order that with his knowledge of American corporation law, he might offer to such American investors in Mexico the opportunity of procuring in one office a sound financial structure on the one hand, and full protection for their investments on the other hand.

"Mr. Kerr was a Spanish student and scholar and his 'Handbook of Mexican Law,' published in 1909, was a summary in English of the provisions of the Mexican codes which affected the interests of Americans and other foreigners engaged in business in Mexico. In 1910, he published a translation in English of the recently enacted mining law of Mexico. The following year, he published a volume in Spanish, entitled 'Prontuario de los Codigos Mexicanos,' which is an index digest of the civil, commercial and civil procedure codes of the Federal District of Mexico. This work received official recognition by the Department of Justice of the republic. It is practically the only index digest of the Mexican codes, and its value to the lawyer can only be appreciated in the full by the business man who has found it

necessary, in order to cope with modern business conditions, to systematize and index the information on which he depends.

"Mr. Kerr leaves a host of friends in Oak Park, Illinois, in whose social and community life he played an important part for upwards of 20 years. Many of the older residents of the village will recall with unmitigated pleasure, the revels of the Lime Kiln Club, of which he and his wife (née Blanche Weyburn, of Rockford, Ill.) were extremely active members. He was one of the organizers of the River Forest Tennis Club. In the earlier days he was active in the Westward Ho Golf Club. Since 1914 he has been a member of the Village Library Board, having been once re-elected. He was a member and active in the work of Unity Church.

"Mr. Kerr was a member of the Chicago, Illinois, and American Bar Associations, the River Forest Tennis Club, the American and the Country Clubs of Mexico City, the Sigma Chi fraternity and Phi Delta Phi law fraternity.

"He is survived by his widow, his father, Samuel Kerr, also of Oak Park, and by his three brothers, Major Ellis K. Kerr, U. S. A., now stationed at Fort Oglethorpe, Georgia, and a resident of Oak Park; William D. Kerr, of Oak Park, and Samuel Kerr, Jr., of Jersey City, New Jersey."

WILLIAM D. KERR.

CUT ALONG THIS LINE

AMERICAN BAR ASSOCIATION

DATE_____

MEMBERSHIP PROPOSALS*

THE CONSTITUTION DECLARES MEMBERSHIP, IN GOOD STANDING AT BAR OF ANY STATE DURING THE LAST THREE YEARS, A PREREQUISITE TO ELECTION

NAME OF CANDIDATE PLEASE FILL NAMES IN VERY DISTINCTLY—TYPEWRITING PREFERRED	TITLE HON. OR ESQR.	ADDRESS IN FULL STREET OR BUILDING SHOULD BE PLAINLY NOTED WHEN KNOWN	YEAR AND PLACE ADMITTED TO BAR

I PROPOSE THE ABOVE, WHO DESIRE TO BECOME MEMBERS OF THE ASSOCIATION AND WHO HAVE BEEN IN GOOD STANDING AT THE BAR DURING THE LAST THREE YEARS

PROPOSALS SHOULD BE PROMPTLY FORWARDED TO THE VICE-PRESIDENT FOR THE CANDIDATES' STATE, WHO WILL GIVE THE MATTER IMMEDIATE ATTENTION.

SEE LIST OF THE VICE-PRESIDENTS ON THE REVERSE OF THIS PAGE.

SIGNATURE OF PROPOSER_____

ADDRESS " " _____

* MEMBERS DESIRING TO WRITE FRIENDS WHO ARE MEMBERS OF THE BAR OFFERING TO PROPOSE THEM FOR MEMBERSHIP, WILL FIND SUGGESTIONS AS TO FACTS DESIRABLE TO INSERT IN SUCH A LETTER AT PP. 493-494 OF THE JULY, 1916, ISSUE OF THE AMERICAN BAR ASSOCIATION JOURNAL. COPIES OF THE SUGGESTED FORM MAY BE HAD ON APPLICATION TO THE MEMBERSHIP COMMITTEE; SEE PARAGRAPH 3 ON REVERSE OF THIS SHEET.

[OVER]

In re Proposals for Membership

1. ***All membership proposals*** **should be promptly forwarded direct to the Vice-President for the candidate's State for attention by him and the Local Council for that State. See list of Vice-Presidents below.**

2. **See proposal blank on the reverse side of this page.** ***It is not necessary that candidates should sign any application papers or pay dues in advance of being notified of election by the Membership Committee.***

3. **Additional proposal blanks will be promptly furnished on application to the MEMBERSHIP COMMITTEE, Lucien Hugh Alexander, Esqr., Chairman, 3400 Chestnut Street, Philadelphia.**

4. ***Members when forwarding a membership proposal to a Vice-President will please at the same time have a carbon impression made of the typewritten portion of the proposal, either on a plain sheet or on a duplicate blank, and at once transmit it to the MEMBERSHIP COMMITTEE at above address. It is not essential that there should be a letter of transmittal with a proposal; but should one be sent it is requested, in order that a duplicate record may be on file, that a carbon copy of the letter to the Vice-President be at the same time forwarded to the MEMBERSHIP COMMITTEE.***

VICE-PRESIDENTS AMERICAN BAR ASSOCIATION 1918-1919

State	Name of Vice-President	Address
Alabama	Lawrence Cooper	Huntsville.
Alaska	Frederick M. Brown	Judge U. S. Court, Valdez.
Arizona	Charles H. Rutherford	Jerome.
Arkansas	George B. Rose	314 W. Markham St., Little Rock.
California	Frank H. Short	Fresno.
Colorado	W. L. Hartman	First Nat'l Bank Bldg., Pueblo.
Connecticut	William Brosmith	700 Main St., Hartford.
Delaware	Edward G. Bradford	U. S. District Judge, Wilmington.
Dist. of Columbia.	George A. King	728-17th St., Washington.
Florida	A. J. Rose	Ralston Bldg., Miami.
Georgia	Samuel B. Adams	Savannah Fire Ins. Co. Bldg., Savannah.
Hawaii	Alex. G. M. Robertson	Chief Justice Supreme Court, Honolulu.
Idaho	Frank S. Dietrich	U. S. District Judge, Boise.
Illinois	Mitchell D. Follansbee	137 La Salle St., Chicago.
Indiana	Charles L. Jewett	Main and Pearl Sts., New Albany.
Iowa	Thomas J. Bray	7-9 Golden Eagle Block, Oskaloosa.
Kansas	Wm. Osmond	1515 Stone St., Great Bend.
Kentucky	Lewis Apperson	Mt. Sterling.
Louisiana	Allan Sholars	Hudson Bldg., Monroe.
Maine	William M. Ingraham	97 Exchange St., Portland.
Maryland	Wm. L. Marbury	700 Md. Trust Bldg., Baltimore.
Massachusetts	Henry N. Sheldon	270 Commonwealth Ave., Boston.
Michigan	Burritt Hamilton	Kingman Bldg., Battle Creek.
Minnesota	Stiles W. Burr	32 Merchants Nat. Bk. Bldg., St. Paul.
Mississippi	A. W. Shands	Cleveland, Miss.
Missouri	Frank Hagerman	1211 Commerce Bldg., Kansas City.
Montana	William T. Pigott	29 Bailey Block, Helena.
Nebraska	R. A. Van Orsdel	601 Keeline Bldg., Omaha.
Nevada	S. S. Downer	139 N. Virginia St., Reno.
New Hampshire	Reuben E. Walker	Justice Supreme Court, Concord.
New Jersey	Richard Wayne Parker	765 Broad St., Newark.
New Mexico	Wm. C. Reid	Cromwell Bldg., Albuquerque.
New York	Everett P. Wheeler	27 William St., New York, N. Y.
North Carolina	Platt D. Walker	Justice Supreme Court, Raleigh.
North Dakota	Harrison A. Bronson	Northwestern Bldg., Grand Forks.
Ohio	Edward Kibler	Newark Trust Co. Bldg., Newark.
Oklahoma	C. A. Galbraith	Supreme Court Commission, Ada.
Oregon	Richard W. Montague	Yeon Bldg., Portland.
Pennsylvania	William H. Staake	501 Franklin Bldg., Philadelphia.
Philippine Islands and China	Charles S. Lobingier	Judge U. S. Court, Shanghai, China.
Porto Rico	Manuel Rodriguez Serra	San Juan.
Rhode Island	Thomas A. Jenckes	916 Turks Head Bldg., Providence.
South Carolina	T. Moultrie Mordecai	People's Office Bldg., Charleston.
South Dakota	Chas. S. Whiting	Judge Supreme Court, Pierre.
Tennessee	Robert F. Jackson	230 4th Ave., N., Nashville.
Texas	Hiram Glass	701 Scarbrough Bldg., Austin.
Utah	P. L. Williams	1505 Walker Bank Bldg., Salt Lake City
Vermont	Geo. M. Powers	Justice Supreme Court, Morrisville.
Virginia	James H. Corbitt	Suffolk.
Washington	Charles E. Shepard	New York Bldg., Seattle.
West Virginia	J. B. Sommerville	Schmulbach Bldg., Wheeling.
Wisconsin	William F. Shea	Ashland.
Wyoming	Constantine P. Arnold	Laramie.

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